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Notice of Inquiry of Federal Communications Commission (January 19, 1976)	FCC App. 60a
Memorandum Opinion and Order of Federal Communications Commission (July 30, 1976)	FCC App. 117a
Memorandum Opinion and Order on Reconsideration of Federal Communications Commission (August 25, 1977)	FCC App. 176a
Opinion of the United States Court of Appeals for the District of Columbia Circuit (June 29, 1979)	FCC App. 1a
Judgment of the United States Court of Appeals for the District of Columbia Circuit (June 29, 1979)	FCC App. 57a

I

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

*WNCN Listeners Guild and Citizens
Communications Center
v. Federal Communications Commission
and United States of America*

No. 76-1692

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1976	
July 28	Petition of petitioners for review of order of FCC
29	Certified copy of petition for review mailed to FCC and Attorney General by certified mail
30	Motion of FCC to dismiss petition for review
Aug. 11	Motion of petitioners to amend petition for review
12	Consent motion of petitioners for leave to file opposition to motion to dismiss, time having expired
17	Response of FCC to motion to amend petition for review
18	Order granting petitioners' consent motion for leave to file opposition to motion to dismiss, time having expired
18	Opposition of petitioners to motion to dismiss
18	Reply of FCC to opposition to motion to dismiss
24	Motion of ABC for leave to intervene
25	Certified mail receipt from Attorney General returned
26	Motion of NAB for leave to intervene
Sept. 2	Order granting ABC and NAB leave to intervene
16	Motion of FCC to defer filing of the record
16	Motion of petitioners to consolidate with No. 76-1793 and to hold in abeyance

DATE	FILINGS—PROCEEDINGS
1976	
Oct. 26	Order denying motion to dismiss, granting motion to consolidate Nos. 76-1692 and 76-1793, and extending date for filing of the record to 31 days after FCC ruling on petition for reconsideration
1977	
Aug. 29	FCC's notice of decision on petitions for reconsideration
Sept. 23	Certified index to record
26	Motion of petitioners to extend time to file brief to Dec. 5, 1977
Oct. 11	Order extending time to file petitioners' brief to Dec. 5, 1977
20	Motion of petitioners to amend petitions for review
27	Order directing Clerk to file and serve amended petition for review and granting motion to consolidate with No. 77-1951
31	Certified copy of above order mailed to FCC and Attorney General by certified mail
Nov. 14	Certified mail receipts for amended petition for review returned
14	Motion of petitioners to proceed under Rule 30(c), deferred appendix
17	Order granting petitioners' motion to proceed under Rule 30(c)
22	Motion of petitioners to extend time to file brief to Jan. 16, 1978
28	Order extending time to file petitioners' brief to Jan. 16, 1978

DATE	FILINGS—PROCEEDINGS
Dec. 27	Motion of petitioners to extend time to file brief to Feb. 24, 1978
1978	
Jan. 6	Order extending time to file petitioners' brief to Feb. 24, 1978
Feb. 13	Motion of petitioners to extend time to file brief to Mar. 10, 1978
Mar. 13	Motion of Classical Music Supporters, Inc. for leave to file brief as amici curiae
21	Order granting motion of Classical Music Supporters, Inc. for leave to file brief as amici curiae and extending time for filing petitioners' brief
21	Brief of Classical Music Supporters, Inc.
21	Brief of petitioners
31	Motion of FCC to extend time to file brief to June 12, 1978
Apr. 19	Order extending time to file FCC brief to June 12, 1978 and extending time for filing intervenors' briefs to 15 days after FCC's brief is filed
May 31	Motion of FCC to extend time to file brief to July 14, 1978
June 16	Order extending time to file FCC's brief to July 14, 1978 and amending briefing schedule so that intervenors' briefs are to be filed on July 31, 1978, and petitioners' reply briefs are to be filed on August 15, 1978
July 25	Motion of FCC for leave to file brief, time having expired
26	FCC's suggestion for hearing en banc
31	Order extending time to file FCC's brief

DATE	FILINGS—PROCEEDINGS
1978	
July 31	Intervenors' motion to extend time to file brief to Aug. 10, 1978
31	Brief for respondent
31	Motion of petitioners to extend time to file deferred appendix and reply briefs
Aug. 3	Brief for NAB
7	Order extending time to file deferred appendix and reply briefs to Sept. 15 and Oct. 2, 1978, respectively
10	Brief for ABC
Sept. 15	Joint Appendix
15	Copy of exhibit
20	Motion of petitioners to extend time to file reply brief to Nov. 3, 1978
27	Brief for CBS
29	Brief for ABC
29	Brief for NAB
Oct. 3	Order extending time to file petitioners' reply briefs to Nov. 3, 1978
19	Motion of FCC for leave to file printed brief, time having expired
26	Order granting FCC's motion to file brief, time having expired
26	Brief for FCC
26	Per curiam order denying FCC's suggestion for rehearing en banc

DATE	FILINGS—PROCEEDINGS
1978	
Nov. 6	Reply brief for petitioners
6	Motion of Cornhusker Television Corp. for additional time for oral argument
6	Motion of respondent and intervenors for additional time and permission for additional counsel at oral argument
15	Order referring respondents' and intervenors' motion for additional time and permission for additional counsel at oral argument and motion of Cornhusker Television Corp. for additional time for oral argument to the division of the Court assigned to consider these cases on the merits for disposition
Dec. 14	Order allotting 45 minutes per side for oral argument and granting leave for more than two counsel to present arguments on the side of respondent
29	Order scheduling case for argument on the merits
1979	
Feb. 7	Oral argument en banc before Judges Wright, Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey
Mar. 13	Per curiam order directing Clerk to lodge letter from FCC and letter from petitioner
13	Letter from FCC lodged
13	Letter from petitioner lodged
June 29	Opinion of Court of Appeals by Judge McGowan; concurring opinions by Judges Bazelon and Leventhal; dissenting opinion by Judge Tamm, joined by Judge MacKinnon

DATE	FILINGS—PROCEEDINGS
1979	
29	Judgment vacating FCC Memorandum Opinion and Order
July 17	Opinion issued in slip opinion form
Aug. 27	Certified copy of opinion and judgment issued to FCC

II

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

*Classical Radio for Connecticut, Inc.
and Committee for Community
Access*

*v. Federal Communications Commission
and United States of America*

No. 76-1793

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1976	
Aug. 27	Petition of petitioners for review of order of FCC
30	Certified copy of petition for review mailed to FCC and the Attorney General by certified mail
Sept. 1	Motion of NAB for leave to intervene
9	Certified mail receipt returned from Attorney General
16	Motion of FCC to defer filing of the record
16	Motion of petitioners to consolidate cases and hold in abeyance
27	Motion of Cornhusker Television Corp. for leave to intervene
Oct. 14	Order granting NAB and Cornhusker Television Corp. leave to intervene
26	Order denying motion to dismiss, granting petitioners' motion to amend petition for review, granting motion to consolidate Nos. 76-1692 and 76-1793 and extending date for filing of the record to 31 days after FCC ruling on petition for reconsideration
1977	
Sept. 23	Certified index to record
26	Motion of petitioners to extend time to file brief to Dec. 5, 1977
Oct. 11	Order extending time to file petitioners' brief to Dec. 5, 1977
Oct. 20	Motion of petitioners to amend petitions for review

DATE	FILINGS—PROCEEDINGS
1977	
27	Order directing Clerk to file and serve amended petition for review and granting motion to consolidate with No. 77-1951
31	Certified copy of above order mailed to FCC and Attorney General by certified mail
Nov. 14	Motion of petitioners to proceed under Rule 30(c), deferred appendix
14	Certified mail receipt for amended petition for review returned
17	Order granting petitioners' motion to proceed under Rule 30(c)
22	Motion of petitioners to extend time to file brief to Jan. 16, 1978
28	Order extending time to file petitioners' brief to Jan. 16, 1978
Dec. 27	Motion of petitioners to extend time to file brief to Feb. 24, 1978
1978	
Jan. 6	Order extending time to file petitioners' brief to Feb. 24, 1978
Feb. 13	Motion of petitioners to extend time to file brief to Mar. 10, 1978
Mar. 13	Motion of Classical Music Supporters, Inc. for leave to file brief as amici curiae
21	Order granting motion of Classical Music Supporters, Inc. for leave to file brief as amici curiae and extending time to file petitioners' brief
21	Brief of Classical Music Supporters, Inc.
21	Brief of petitioners

DATE	FILINGS—PROCEEDINGS
1978	
31	Motion of FCC to extend time to file brief to June 12, 1978
Apr. 19	Order extending time to file FCC's brief to June 12, 1978 and extending time to file intervenors' briefs to 15 days after FCC's brief is filed
May 31	Motion of FCC to extend time to file brief to July 14, 1978
June 16	Order extending time to file FCC's brief to July 14, 1978 and amending briefing schedule so that intervenors' briefs are to be filed on July 31, 1978 and petitioners' reply briefs are to be filed on Aug. 15, 1978
July 25	Motion of FCC for leave to file brief, time having expired
25	Motion of Cornhusker Television Corp. to extend time to file brief
26	FCC's suggestion for hearing en banc
31	Order extending time to file FCC's brief and extending time to file brief of Cornhusker Television Corp. to Aug. 10, 1978
31	Brief for respondent
31	Motion of petitioners to extend time to file deferred appendix and reply briefs
Aug. 3	Brief for NAB
7	Order extending time to file deferred appendix and reply briefs to Sept. 15, and Oct. 2, 1978, respectively
10	Brief for Cornhusker Television Corp.
Sept. 15	Joint Appendix

DATE	FILED	PROCEEDINGS
1978		
	15	Copy of exhibit
	20	Motion of petitioners to extend time to file reply brief to Nov. 3, 1978
	27	Brief for CRS
	29	Brief for NAR
Oct.	3	Order extending time to file petitioners' reply briefs to Nov. 3, 1978
	19	Motion of FCC for leave to file printed brief, time having expired
	26	Per curiam order denying FCC's suggestion for hearing en banc
Nov.	6	Reply brief for petitioners
	6	Motion of Cornhusker Television Corp. for additional time for oral argument
	6	Motion of respondents and intervenors for additional time and permission for additional counsel at oral argument
	15	Order referring respondents' and intervenors' motion for additional time and permission for additional counsel at oral argument and motion of Cornhusker Television Corp. for additional time for oral argument to the division of the Court assigned to consider these cases on the merits for disposition
	27	Response of petitioners to motion of Cornhusker Television Corp. for additional time for oral argument
Dec.	5	Response of petitioners to motion of respondents and intervenors for additional time and permission for additional counsel at oral argument

DATE	FILED	PROCEEDINGS
1979		
Feb.	7	Oral argument en banc before Judges Wright, Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey
Mar.	13	Per curiam order directing Clerk to lodge letter from FCC and letter from petitioner
	13	Letter from FCC lodged
	13	Letter from petitioner lodged
June	29	Opinion of Court of Appeals by Judge McGowan; concurring opinions by Judges Bazelon and Leventhal; dissenting opinion by Judge Tamm, joined by Judge MacKinnon
	29	Judgment vacating FCC Memorandum Opinion and order
July	17	Opinion issued in slip opinion form
Aug.	27	Certified copy of opinion and judgment issued to FCC

III

DOCKET ENTRIES

in the

United States Court of Appeals (D.C. Cir.)

in

***The Office of Communication of the
United Church of Christ, et al.
v. Federal Communications Commission
and United States of America***

No. 76-1793

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1977	
Oct. 20	Petition of petitioners for review of order of FCC
	20 Certified copy of petition for review mailed to FCC and the Attorney General by certified mail
	20 Motion of petitioners to consolidate with Nos. 76-1692 and 76-1793
	27 Order directing Clerk to file and serve amended petition for review and granting motion to consolidate with Nos. 76-1692 and 76-1793
	31 Certified copy of above order mailed to FCC and Attorney General by certified mail
Nov. 1	Certified mail receipts for petition for review returned
	9 Motion of Metromedia, Inc. for leave to intervene
	14 Motion of petitioners to proceed under Rule 30(c), deferred appendix
	14 Certified mail receipts for amended petition for review returned
	17 Order granting petitioners' motion to proceed under Rule 30(c)
	17 Motion of NRBA for leave to intervene
	21 Motion of NBC for leave to intervene
	22 Motion of petitioners to extend time to file brief to Jan. 16, 1978
	28 Order extending time to file petitioners' brief to Jan. 16, 1978
	Dec. 5 Order granting Metromedia, NRBA and NBC leave to intervene

DATE	FILINGS—PROCEEDINGS
1977	
6	Motion of CBS for leave to intervene, time having expired
20	Order granting CBS leave to intervene, time having expired
27	Motion of petitioners to extend time to file brief to Feb. 24, 1978
1978	
Jan. 6	Order extending time to file petitioners' brief to Feb. 24, 1978
Feb. 13	Motion of petitioners to extend time to file brief to Mar. 10, 1978
Mar. 13	Motion of Classical Music Supporters, Inc. for leave to file brief as amici curiae
21	Order granting motion of Classical Music Supporters, Inc. for leave to file brief as amici curiae and extending time to file petitioners' brief
21	Brief of Classical Music Supporters, Inc.
21	Brief for petitioners
31	Motion by FCC to extend time to file brief to June 12, 1978
Apr. 19	Order extending time to file FCC's brief to June 12, 1978 and extending time to file intervenors' briefs to 15 days after FCC's brief is filed
May 31	Motion of FCC to extend time to file brief to July 14, 1978
June 16	Order extending time to file FCC's brief and amending briefing schedule so that intervenors' briefs are to be filed on July 31, 1978 and petitioners' reply briefs are to be filed on Aug. 5, 1978

DATE	FILINGS—PROCEEDINGS
1978	
July 25	Motion of FCC for leave to file brief, time having expired
26	FCC's suggestion for hearing en banc
31	Order granting FCC's motion for leave to file brief, time having expired, and extending time to file intervenors' brief to Aug. 10, 1978
31	Brief for respondent
31	Motion of petitioners to extend time to file deferred appendix and reply briefs
Aug. 7	Order extending time to file deferred appendix and reply briefs to Sept. 15 and Oct. 2, 1978, respectively
10	Brief for NRBA
10	Brief for Metromedia, Inc.
10	Brief for CBS
Sept. 15	Joint Appendix
15	Copy of exhibit
20	Motion of petitioners to extend time to file reply brief to Nov. 3, 1978
21	Brief for CBS
29	Brief for petitioners
Oct. 3	Order extending time to file petitioners' reply briefs to Nov. 3, 1978
10	Brief for Metromedia, Inc.
19	Motion for respondents for leave to file printed brief, time having expired

DATE FILINGS—PROCEEDINGS

1978

26 Per curiam order denying FCC's suggestion for hearing en banc

Nov. 11 Reply brief for petitioners

1979

Feb. 7 Oral argument en banc before Judges Wright, Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey

Mar. 13 Per curiam order directing Clerk to lodge letter from FCC and letter from petitioner

13 Letter from FCC lodged

13 Letter from petitioner lodged

June 29 Opinion of Court of Appeals by Judge McGowan; concurring opinions by Judges Bazelon and Leventhal; dissenting opinion by Judge Tamm, joined by Judge MacKinnon

29 Judgment vacating FCC Memorandum Opinion and order

July 17 Opinion issued in slip opinion form

Aug. 27 Certified copy of opinion and judgment issued to FCC

IV

**"RADIO STATION FORMAT CHANGES, DIVERSITY,
AND CONSUMER WELFARE"**

Prepared by Bruce M. Owen

**Appendix 1 to Comments of National
Association of Broadcasters
in FCC Docket No. 20682**

*RADIO STATION FORMAT CHANGES,
DIVERSITY, AND CONSUMER WELFARE*

BRUCE M. OWEN *

1. *Introduction*

The purpose of this paper is to explore some of the economic issues raised in the Federal Communications Commission's *Notice of Inquiry*¹ on the subject of radio format changes. Briefly, the issue is whether the Commission should attempt to regulate such changes, and if so, how. Both the Commission and the Court of Appeals (in the *WEFM*² opinion) have put the question largely into an economic context. In *WEFM*, the court expresses doubt that competing advertiser-supported radio stations can be assumed to serve consumers well, asserts that "diversity" and the "public interest" are co-extensive in this area, and implicitly defines "diversity" as the number of radio formats in a market. The Commission's *Notice* in essence asks for comments on these and other propositions, and for suggestions of practical ways to proceed with the regulation of formats, if it is to be undertaken.

The issues here fit rather neatly into the economic literature on program patterns and diversity. The line taken by the court in *WEFM* is indeed quite consistent

* Assistant Professor of Economics, Stanford University. The author received financial support from the National Association of Broadcasters.

¹ Docket 20682, FCC 75-1426, released Jan. 19, 1976.

² *Citizens Committee to save WEFM v. FCC*, 506 F.2d 246, 252 ff *en banc* rehearing, D.C. Cir., 1974. (The FCC must consider the effects on diversity of a proposed change in the format of a radio station, before approving an assignment of license.)

with the earliest and most primitive models of broadcaster behavior.³ Accordingly, a significant portion of this paper will be concerned with these models. This will be followed by a discussion of the economic efficiency of competing, advertiser-supported radio stations, and the prospects for improving efficiency through regulation of formats.

It is quite important to remind ourselves at the outset that in discussing radio we are discussing one of the most competitive and atomistic of media. There are upwards of 8,000 radio stations on the air in the United States; large cities have dozens of stations competing for listeners and for advertisers. There is no reasonable sense in which radio voices can be characterized as scarce or monopolistic in the markets where most people live. Indeed, various agencies of the government have, since 1971, been proposing that the radio industry be "deregulated."⁴

2. Steiner Models

Peter O. Steiner formulated the earliest model of program patterns in radio.⁵ This model has since been re-

³ Peter O. Steiner, "Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting," 66 *Quarterly J. Economics* 194 (1952); J. Rothenberg, "Consumer Sovereignty and the Economics of TV Programming," 4 *Studies in Public Communication* 45 (1962); Peter Wiles, "Pilkington and the Theory of Value," 73 *Economic Journal* 183 (1963); for a critical summary of this literature, see Owen, Beebe, and Manning, *Television Economics* (1974), at 49-90.

⁴ C. T. Whitehead, "Remarks Before the IRTS," reprinted in M. Barrett, ed., *The Politics of Broadcast Regulation* (1973). This 1971 speech provided the first suggestion of and rationale for radio deregulation.

⁵ Steiner, op.cit.

financed and criticized by a number of economists. The model begins with these assumptions:

1. There exist meaningful categories called "program types," or in this case "formats."
2. Every broadcast can be assigned to one of these types.
3. All broadcasts belonging to a given type are assumed to be perfect substitutes; that is, no listener is made better off by having a choice of two programs belonging to a given type than he is with only one program of that type.
4. Further, it is assumed that the number of competing broadcasters is small, and that broadcasting is supported entirely by advertising.
5. It is assumed that the distribution of tastes in the listening population is "skewed," so that there are a large number of consumers who prefer some particular program type, and smaller "minority taste" groups preferring other types.
6. Listeners have no second choice programs; if their preferred program type is not available, they will not listen at all.
7. Finally, it is assumed that all programs have identical production costs and that all listeners are worth equal amounts of advertising revenue to stations.

It is readily demonstrated that these assumptions lead to the following conclusions: (1) Competing broadcasters will tend to wastefully duplicate programs of the same type. This is so because broadcasters split up larger audience groups until the point is reached where it is profitable to serve the next smaller audience group. (2) There is a tendency not to broadcast minority taste programming. (3) A monopolist who controlled all of

the radio channels would not engage in duplication and would tend to produce more minority taste programming, thus serving a larger total listening audience. (Note that if the WEFM court really believes its own model, then it could pursue increased diversity by allowing a monopolist to control *all* the channels.) (4) An omniscient regulator could dictate program formats with the same result as (3). The demonstration of these propositions takes the form of numerical examples, which can be found in the literature.⁶

The thrust of the analysis in the *WEFM* opinion is consistent with these conclusions. The court seems to point to advertiser-support as the source of the imperfect performance of the industry. It is important to recognize that advertiser-support is but one, and by no means the most important, of the assumptions which fuel the workings of the model. Every single one of the other assumptions is either demonstrably false or improbable. I leave for later the question of program types and the related discussion of diversity. As to the other assumptions: (1) The number of radio broadcasters is not small but large. The model with this assumption relaxed predicts that minority taste programs *will* be broadcast, though there may still be duplication. (2) If the distribution of tastes is not skewed but relatively uniform, there will be no duplication. There is no empirical evidence on the distribution of tastes. Moreover, it is wrong to think about the distribution of tastes without taking account of the intensity of preferences. (3) It is improbable that listeners have no second and lower-ranked preferences. If they do have such preferences, monopolists will seek "common denominator" programs. (4) Radio programs do not have identical costs. If costs differ, it is impossible to make general state-

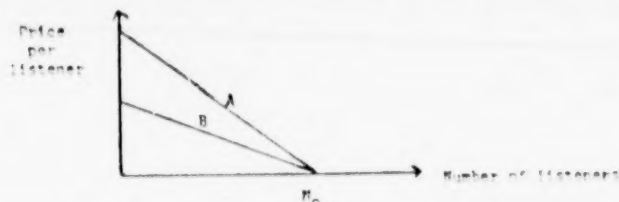
⁶ See, e.g., *Television Economics* at 51-52, and the Appendix to this paper.

ments about the problem using this model. (5) Advertisers do care about the demographic characteristics of audiences. Many advertisers have age, sex or income related products. If they do, it is impossible to make general statements about the problem using this model.

Thus, while the Steiner-type models do provide apparently scientific support for preconceived subjective notions of broadcast market imperfections, the assumptions required to generate the necessary results are quite unreasonable. If this were the only objection, harm enough would be done. But the matter is more serious. Steiner-type models have an entirely inappropriate implicit metric of consumer welfare. In particular, these models associate larger audiences with greater consumer satisfaction, a practice akin to taking a plebiscite on the size of next year's wheat crop. This is not the way to measure economic welfare, nor is it an appropriate criterion for a court to use in defining a metric of the public interest.

The satisfaction of consumers' demand for goods and services is measured, conventionally, by willingness to pay in dollars. Resources are allocated among competing uses in a market economy by prices, acting as signals of value. When we discuss consumer welfare, we talk about consumers' dollar income. In analyzing a particular market, abstracting from distributional issues, we measure efficiency by the relationship of price and marginal cost. The contribution of the market to consumer well-being can under certain conditions be measured by the "consumer surplus" in the market, this being the difference between the amount consumers are willing to pay and what they do pay. Efforts to characterize the behavior of radio markets as better or worse, efficient or inefficient, and so on, on the basis of a head-count of consumers thus lie entirely outside the range of welfare economics.

A diagram may help here. Consider the demand by listeners for two programs, A and B.



The demand curves show how large the audiences for each program will be at various prices. They also show willingness to pay. For instance, at a zero price both programs will have an audience of N_0 listeners. Consumer welfare is measured by the area under the demand curve, above the price charged. Clearly, for the programs in the diagram, consumer welfare is greater for program A than for B at all price levels. Yet Steiner models are indifferent between A and B because at a zero price the audience sizes are the same. Now if the demand curve for B were moved very *slightly* upward and to the right, so that the number of listeners for B at a zero price were $N_0 + 1$, the Steiner criterion would say that we ought always to choose program B. But of course, from the point of view of consumer welfare, program A is still the appropriate choice. Bluntly, the Steiner models tell us *exactly nothing* about the efficiency of competitive advertiser-supported radio broadcasters, because they contain no information on the strength or intensity of consumers' preferences.⁷ Of course, the willingness of various consumer groups to form committees to propose format changes, or to "grum-

⁷ This is not a criticism of their authors, who were well aware of these shortcomings. The Steiner models made a good deal of sense as early attempts to understand the behavior of broadcast markets. That Newtonian physics is now known to be but a "special case," reflects no discredit on Newton.

ble" as the Court puts it, reflects intensity of preference. But it also reflects the age, income, and educational level of the group. To the extent that we rely upon "grumbling" to measure intensity of preferences, we may well unfairly favor more highly educated and wealthy groups at the expense of the less fortunate.

3. Program Types, Formats, and the Meaning of Diversity

Diversity, as the word is used in the present context, means the number of different program types or radio formats. The Court in *WEFM* makes a direct connection between diversity thus measured and the public interest, and at least suggests a direct connection between diversity and consumer satisfaction.

It is inappropriate for me to comment here on the question, whether diversity is a valid goal of government regulation under the First Amendment.⁸ But since it is readily apparent that there is no necessary relation whatever between diversity and consumer satisfaction, the court errs in relying on economics to support the existence of a link between diversity and the public interest.

It seems that we are not to regard the format of each station as *sui generis*, but instead to imagine the construction of some finite number of theoretical formats, in which set of procrustean beds each station in a market must lie. We are then to suppose that the value to consumers of having an additional station in any already occupied bed is always and exactly zero, while the value to consumers of having a new bed occupied is always some large, positive number. But consumers can and do have preferences among stations which

⁸ See Owen, *Economics and Freedom of Expression: Media Structure and the First Amendment* (1975) at Chap. 1, 3.

have similar formats. All stations with the same format do not have identical programs. Stations with the same music format will have different non-music programs and advertising, to say nothing of announcer personalities. Consumers do not allocate themselves at random among stations with the same format. There is some increase in consumer satisfaction associated with the addition of a new station within a given, already occupied, format. There may be as much "diversity" within formats as among formats. Whether consumers would be economically better off with an entirely new format or another station on an old format is a question which cannot even be addressed in the abstract. Indeed, as we shall see, it cannot be answered at all without detailed empirical data concerning individual consumers' demand schedules and program costs, and even then only in a partial equilibrium context. Yet the *WEFM* mandate requires precisely this sort of analysis.

It is important to note that pursuit of increased diversity in radio station formats is as likely to leave consumers worse off as better. Indeed, in the context of any practical enforcement mechanism, pursuit of such a goal is more likely to leave consumers worse off, by introducing a new and formidable barrier to innovation in programming. A station which abandoned a given, possibly "unique" format in order to experiment with a novel variation which either did not fit any official label or was forced into some pre-existing one, could count on having to spend considerable time and money in FCC proceedings.

Similarly, a station would hesitate to adopt an experimental format because of the danger that it might be locked in if it were unsuccessful. Radio stations are continually experimenting with innovations in programming in response to competitive pressures and changing listener tastes. This experimentation is risky. Regulatory procedures which increase the costs and risks of

experimentation will retard innovation. This is hardly in consumers' interest. It is doubtful whether such relatively recent innovations as the "all news" format could have arisen under the *WEFM* rule.

To summarize: It is quite unreasonable to suppose that consumers do not value additional options within a given format, or even suppose that this value will always or even usually be less than the value of a new format. Any such conclusion could never be a general statement about the world, and in any given case would depend on an actual measurement of the economic variables involved.

4. *Radio Competition and Economic Efficiency*

It is normally presumed that competitive firms in an ordinary market will produce the correct quantity, type, and quality of goods, from the point of view of consumer welfare. In *WEFM*, it is argued that no such presumption can be maintained for radio markets, because listeners do not pay directly for programs. Is it true that radio markets are inefficient, and that they tend in particular to produce too little format diversity?

The price of radio programs to listeners is zero. This is so in part because it is impractical to charge listeners for programs; the transactions costs of collecting the fees would exceed by many times the prices that could be charged for the programs. Moreover, in radio, zero prices are actually *efficient* prices, in one important sense, because programs are "public goods." The marginal cost of supplying a program to another listener is literally zero; therefore the price "should" be zero.

The performance of the radio industry with advertiser-support is not properly compared to the performance of the industry with direct listener payment. The fact is that without advertiser-support, there would be no private radio stations. This would be a considerable "market failure," attributable to high transactions costs. Ad-

vertising immensely reduces this failure, by permitting radio broadcasting to exist.

Some very recent work on the theory of monopolistic competition can shed light on the issue of efficiency.⁹ Monopolistic competition is a term used by economists to describe a situation in which large numbers of firms, each small relative to the market, compete in producing products which are differentiated—not perfect substitutes. This corresponds exactly to the situation in radio broadcasting. Prices in such an industry are always “competitive.” There are no monopoly profits. Moreover, prices are always equal to incremental cost—the cost of producing and selling the marginal unit. But it can be shown that, if there are any fixed costs of production, some products which ought to be produced will not be. These are products whose value in consumption exceeds their cost of production, but which nevertheless are not profitable to produce because producers can not extract a sufficient price from consumers. Roughly speaking, such products will be characterized by relatively inelastic demand schedules and relatively small groups of consumers. This means that monopolistic competition is always a “second-best” process. It can never achieve maximum theoretical economic efficiency. Relatively high set-up costs make it impossible to have either products or programs tailor-made to the tastes of each individual. However, the efficiency that is achieved by monopolistic competition is the best that can be done; there exist no feasible policy tools which could improve matters.

Radio broadcasting, for this reason, and because of the public good problem, and because of the impracticality of charging listeners for programs, is very much a second best world as well. But the present structure of the

⁹ M. Spence and B. Owen, “Television Programming, Monopolistic Competition and Welfare,” *Quarterly J. Economics* (forthcoming); an earlier version appears in *Economics and Freedom of Expression* at 143-168.

market for radio stations is very likely to be the best of the possible arrangements. A monopolist of all the channels would, for example, do worse. Moreover, because of the large number of radio stations, it is very likely as a practical matter that the magnitude of the efficiency loss is quite small, compared to other industries.

The imperfection in monopolistically competitive markets in general, and radio markets in particular, which has just been identified, has absolutely nothing to do with diversity, as the word is used in the format controversy. The optimal mix of programs or formats, that which maximizes the value of broadcasts to consumers net of cost, may contain either more or fewer format types than now exist. Moreover, advertiser support is not the “cause” of the imperfection, any more than it is the cause of a market failure in the newspaper industry, which obtains more than 70% of its revenue from advertising.¹⁰ Fixed costs are the problem, and they are a quite general problem. Radio does not present a unique or peculiar problem of market failure.

5. Regulatory Alternatives

If one were to accept the premises of the Steiner model or if one were to set out to do something about the problem of monopolistic competition, it would be natural to ask what regulatory strategy the government might follow in order to improve matters. Which programs, or formats, not available now, should we require licenses to broadcast, in order to make consumers better off? Again, I leave aside the obvious and violent First Amendment objections which such an exercise must inevitably raise.

In order to decide which programs or formats to mandate, the government must have access to the following data: (1) Complete information on the demand schedule of every consumer group for every relevant pro-

¹⁰ Statistical Abstract (1973), p. 502.

gram or format, together with the cross-elasticities of demand among all of the programs at every point on every demand schedule. (2) Complete information on the cost or production of every program or format at all relevant levels of quality and quantity. (3) Complete information on the conjectural reactions of each station to alterations in the programs or formats of every other station in the market. This is not an exaggeration. No lesser degree of information will do.

Are these data obtainable? In principle, the government might possibly be able to discover the program costs, and conceivably even model the interaction of the firms over all the relevant equilibria. But the required information about consumer cannot be obtained. Consumers, aware that the information will affect decisions, will always have an incentive to exaggerate the strength of their preferences for their most preferred formats. If the FCC were to send out a survey questionnaire, asking listeners to tell how much each format is worth to them in dollars (which is what one needs to know), every consumer would have a perfectly reasonable incentive to say that their favorite format was worth a million or a billion dollars a year. Indeed, to the extent that each consumer recognized the universality of the incentive, each would report that his favorite format was vital to life itself. Such a questionnaire would have to be very sophisticated to elicit the required information.¹¹

Clearly this will not do. Does there exist any rule of thumb which will do the trick? In particular, will any variant of the court's proposal in *WEFM* serve? No. We have already seen that there is no necessary relationship between diversity and economic welfare. Seeming

¹¹ See T. Groves, "Incentives in Teams" 41 *Econometrica* 617 (1973); J. Green and J.-J. Laffont, "On the Revelation of Preferences for Public Goods" Technical Reports 140, 141, Institute for Mathematical Studies in the Social Sciences, Stanford, 1974.

diversity of formats will not help, and may easily make things worse. The best that can be done is to make the number of radio stations as large as the market will support. This point has surely been reached already to the extent that marginal stations just break even.

Short of omniscience, in the literal sense, we are already doing as well as can be done in radio broadcasting. If there is a way to improve matters, it lies in the direction of devoting fewer of the industry's resources to the litigious demands of regulation. If radio stations spent less money on regulatory proceedings, that money would be devoted to higher quality¹² programming, precisely because of the high degree of competition in the industry.

6. Conclusion

There exists no economic support for the notion that an increase in diversity, as defined by the Court of Appeals in *WEFM*, will make consumers better off. This concept of diversity is unrelated to any economic measure of consumer well-being. Pursuit of such a goal will very likely, when the costs imposed by regulation itself are taken account of, make consumers worse off. The market for radio broadcasts does have imperfections, when compared to the theoretical ideal. These imperfections have nothing whatever to do with advertiser-support. It is flatly inconceivable that any government agency could remedy the imperfections, because the required information is not obtainable. Even if the information were obtainable, the result might just as easily be a reduction as an increase in diversity as measured by the Court of Appeals. The only practical policy which might improve performance in radio is a thorough-going effort to deregulate the industry.

¹² "Quality" is used here in a non-normative sense. More money would be spent on programming in ways designed to make it more attractive to listeners. Also, a few new stations would probably be viable on the margin.

APPENDIX

The following numerical example contains all of the Station assumptions:

Station group	1	2	3
Number of people in group	80	25	15
Preferred format type	A	B	C

Equilibrium Program Pattern
if the stations are:

Number of stations or channels	Competitive	Monopoly
1	A	A
2	AA	AB
3	AAB	ABC

Note the "wasteful duplication" of the format type A with competition and the "superior performance" of a monopolist. It may be the assumptions listed in the text are not valid; this would no longer follow. In particular, if the groups have any lower ranked formats in common, only that format will be broadcast by the monopolist. If the distribution of group sizes is more even, say 27, 22, 20 then the program pattern for 3 stations in competition will be ABB. If the two "A" type formats are not easily substitutable either way then it is wrong to call the monopoly AAB wasteful. Indeed, one must compare the benefits of group 1 of having a choice with the lost benefits of group 2 of not having programs 1. Suppose the people in group 1 were willing to pay up to 10¢ each, on average, to have a choice of over format "A" programs, given that there were already one. Then the marginal benefit to that group of a monopolist broadcasting AA, as opposed to an independently owned A, is \$6.00. If the people in group 1 were willing to pay that much on average per listen, at a 20¢ each for one exclusive broadcasting 1, then the net to them of not having 1 is \$2.00. The result is that the monopoly AAB provides group 1 and consumer satisfaction that the "more diverse" monopoly ABB, in the net economy, is \$2.00.

V

"A REPORT ON RADIO STATION FORMAT CHANGES"

Prepared by Robert E. Hennbery

Appendix to Comments of American
Broadcasting Companies, Inc.
in FCC Docket No. 20682

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April 12, 1976

A REPORT ON RADIO STATION FORMAT
CHANGES PREPARED BY ROBERT E. HENABERY
TO ACCOMPANY COMMENTS OF AMERICAN
BROADCASTING COMPANIES, INC. SUBMITTED
TO THE FEDERAL COMMUNICATIONS COMMIS-
SION IN DOCKET # 20682 ("CHANGES IN THE
ENTERTAINMENT FORMATS OF BROADCAST
STATIONS").

INTRODUCTION:

This report has been prepared for American Broadcasting Companies, Inc. by Robert E. Henabery, President of Bob Henabery Associates, Inc., 136 East 55th Street, New York, N.Y. 10022. The purpose of the report is to accompany ABC's comments submitted to the Federal Communications Commission in Docket # 20682.

PROFESSIONAL BACKGROUND OF ROBERT E. HENABERY:

Presently Mr. Henabery is a consultant providing his clientele personal consulting in positioning, programming and operations in the nation's major and medium radio markets. He is a specialist in new radio format development. He also provides seminar services for the National Association of Broadcasters' fall regional meetings. In addition, he is currently preparing a disco music service and a classical music service for national syndication purposes.

Prior to forming his own company in June 1974, he was an employee of ABC's Radio Division. For six years (1968-1974) he served as Director of Program Development, Owned AM Stations, ABC Radio Division, New York. Additionally (1971-1973), he served as consultant for Owned FM Stations, ABC Radio Division, New York. In these capacities, his responsibilities included, among other things, evaluating the performances of ABC's Owned AM Stations; forecasting problems and opportunities in programming within ABC's seven cities of license; continuously visiting markets to analyze programming of Owned AM and competing stations; coordinating certain creative activities; assisting in the innovation of a successful FM "Rock 'n Stereo" format; and studying new operational techniques developed at Owned Stations and elsewhere in the industry.

Mr. Henabery's employment experience in radio programming also includes three years as Director of Programs, Yankee Division, RKO General Broadcasting, Inc. in Boston and ten years as Program Manager of Station WWJ, Detroit. In the former position he helped convert Station WRKO-FM, Boston, to a contemporary format—the first of its kind in a major market.

SCOPE OF THE REPORT:

The report has been prepared in three parts.

PART I. THE RADIO INDUSTRY IN THE LAST DECADE is a brief discussion of recent history subsequent to the Commission's 50% rule regarding the separation of duplicated AM/FM stations under common ownership in a market. It is perceived as a decade of change—from general service to specialization.

PART II. TWO MARKETS—WASHINGTON, D.C. AND TULSA, OKLAHOMA is an analysis organized as follows:

- A. Growth of FM in Washington, D.C. and Tulsa, Oklahoma
- B. Monitor of Washington, D.C. and Tulsa, Oklahoma Markets, Spring 1976
- C. Probable Effects of Governmental Intervention in Format Changes

PART III. YARDSTICKS USED IN RADIO FORMAT DEVELOPMENT describes the method used by the writer to develop programming, and demonstrates, by using hypothetical but plausible examples drawn from thirty years of professional experience, some of the practical problems of determining what constitutes a radio station format change.

PART I. THE RADIO INDUSTRY IN THE LAST DECADE

When demographics (or the grouping of listeners by sex and age) were introduced to radio on a nationally syndicated basis in 1966, station programmers could begin to see their audiences as they really were, i.e., as effects of programming, and, knowing that different kinds of people would respond to programming in different kinds of ways, began to learn how to position themselves against their competitors by the trial and error method of changing their programming in order to target on specific sex-age groups. Prior to the publication of ARB's sex-age data, programming was primitive and totally intuitive. (Intuition and deduction continue to play important roles in the programming art because of the high cost of securing other important data, such as education, income, family size, etc., which prohibit their use except in special situations when the need overcomes normal financial considerations.)

Positioning or specialization was accelerated by the separate growth of FM when, beginning in 1967, the Commission required FM stations, wherever owned in common with an AM in the same market, to discontinue the duplication of at least 50% of the AM programming on FM and to program independently.

Specialization was further accelerated by the post World War II population explosion of teens and young adults who are heavy users of radio, and by a much greater interest in news and public affairs since the early 60's. For example, the nation's first all news radio station, WINS in New York City, went into that format in the spring of 1965.

From 1966 until the present time, radio, particularly in the larger markets, changed dramatically from

what it was to what it is now—from general service to specialization.*

This was also an advertising and marketing imperative as a secondary general service radio station could not compete on an equal footing against television for broadcast advertising dollars. Its general audience was too small for mass marketing purposes; it needed more narrowly defined target audiences.

* A general service station is one which has a variety of different programs at different times during the day and week appealing to a variety of audiences, each of which may use it for one or more of the programs. General service stations are described within the trade as being "all things for all people." A general service station is apt to have an early morning personality along with news and service features, chit chat or music later in the morning, heavy news at noon, more chit chat or music in the afternoon—possibly a phone-opinion program, an afternoon news block and music or sports or special programming late at night. Most major markets tend to have one surviving general service station.

A specialized station tends to take one program and spread it over the entire week. Specialized stations attract more specialized audiences.

The value of a general service station compared to the value of a specialized station can be said to be analogous to the value of a department store compared to the value of a specialized shop or boutique. But this is a bad comparison inasmuch as a department store offers the convenience of all its departments simultaneously, whereas a general service station does not since it cannot present more than one program at a time.

General service can be characterized by saying "at least once a day something for everybody."

Specialization can be characterized by saying "immediate gratification of the specialized and momentary taste."

PART II. TWO MARKETS—WASHINGTON, D.C. AND TULSA, OKLAHOMA:

A. *Growth of FM in Washington, D.C. and Tulsa, Oklahoma*

1. The Washington, D.C. Radio Market

a. *Definition*

The Washington, D.C. radio market is defined to include all stations rated in either the Oct/Nov 1967 ARB report or the Oct/Nov 1975 report for the cities of Alexandria, Va., Arlington, Va., Bethesda, Md., Fairfax, Va., Falls Church, Va., Morningside, Md., Silver Spring, Md., Washington, D.C., Wheaton, Md., and Woodbridge, Md. but *not to include* other rated stations in Baltimore, Md. (WCAO, WLIF, WPOC), La Plata, Md. (WSMD/WSMD-FM) and Manassas, Va., (WPRW); any rated suburban station but not able to be heard in downtown Washington (WINX, Rockville, Md.); unrated educational stations (e.g., WAMU, WETA, WGTB, WGTS); * unrated foreign language stations (WFAN); and unrated outside stations (e.g., WLS, WABC).

The stations *included* here in the Washington, D.C. radio market normally amount to about 90% of the total listening; the stations *excluded* from the Washington, D.C. radio market (mentioned by call letters in the preceding paragraph) normally amount to only about 10% of the total listening in any one ARB report.

* It is an ARB policy not to include educational stations even though they may meet its minimum reporting standards.

This analysis does not, therefore, deal with stations reported in the ARB which are not indigenous to the geographic marketing area. For example, WCAO, Baltimore, Md. has a small audience reported in the Washington, D.C. ARB but it is by all standards a Baltimore, Md. radio station.

b. *Individual Station Comparison—Shares*

Stations	Oct/Nov 1967	Call Letter Change	Oct/Nov 1975
WASH (FM)	3.0		3.8
WAVA (AM)	2.2		.9
WAVA-FM	—		1.9
WDON (AM)	1.5		.4
WEAM (AM)	5.6		1.3
WEEL (AM)	—		1.2
WEZR (FM)	—		1.6
WFAX (AM)	.7		.4
WGMS (AM)	2.2		1.0
WGMS-FM	1.5		1.7
WHFS (FM)	.4		1.0
WJMD (FM)	5.2		4.7
WMAL (AM)	14.1		13.7
WMAL-FM	—		2.4
WOL (AM)	5.2		4.2
WOL-FM	1.1	WMOD (FM)	2.8
WOOK (AM)	4.1		1.5
WPGC (AM)	8.5		2.8
WPGC-FM	3.3		6.9
WPIK (AM)	1.5		1.9
WXRA (FM)	—		1.1

Stations	Oct/Nov 1967	Call Letter Change	Oct/Nov 1975
WQMR (AM)	2.6	WGAY (AM)	1.8
WGAY-FM	3.0		9.6
WRC (AM)	8.9		2.7
WRC-FM	—	WKYS (FM)	4.6
WTOP (AM)	7.4		5.0
WTOP-FM	1.5	WHUR (FM)	1.0
WUST (AM)	.4		4.8
WWDC (AM)	5.9		1.9
WWDC-FM	1.5		1.3
Other	8.7		10.1
	100.0%		100.0%

c. Consolidated Comparison—Shares

	Oct/Nov 1967	Oct/Nov 1975
AM	70.8	44.8
FM	20.5	44.4
Other	8.7	10.8
	100.0%	100.0%

d. Comparison of AM/FM—Percentages of Increase

	Oct/Nov 1967	Oct/Nov 1975	Increase
AM	77.5	50.2	— 35.2%
FM	22.5	49.8	+121.3%
	100.0%	100.0%	

e. The Emergence of Top Rated Specialized FM Stations in Washington, D.C.

In 1967—Washington was dominated by five AM stations (*three* of them general service) which accounted for 49% of the listening in the Washington radio market.

Station	Type*	Share
WMAL	General Service	15.4%
WRC	"	9.7%
WPGC	Music for Young People	9.3%
WTOP	Talk for Older People	8.1%
WWDC	General Service	6.5%

In 1975—it took only one more station to account for 49% of the listening in the Washington radio market but four of the six were FM and only *one* of them was general service.

Station	Type	Share
WMAL	General Service	15.0%
WGAY (FM)	Music for Older People	10.5%
WPGC (FM)	Music for Young People	7.6%
WTOP	News for Older People	5.5%
WJMD (FM)	Music for Older People	5.1%
WKYS (FM)	Music for Young People	5.0%

* Designations of specialized stations by "Type" have been made as wide as practical using subjective language describing the general image of the station at the time, e.g., "Music," "Talk," etc., and combining objective demographic data, e.g., "young people," from the ARB library in New York.

2. The Tulsa, Oklahoma Radio Market

a. Definition

The Tulsa, Oklahoma radio market is defined to include all stations rated in either the Oct/Nov 1967 ARB report or the Oct/Nov 1975 report for the cities of Broken Arrow, Okla., Claremore, Okla., Sand Springs, Okla., and Tulsa, Okla. but not to include other rated stations in Coffeyville, Kan. (KGGF); unrated educational stations; and unrated outside stations (e.g., WLS, WABC).

The stations included here in the Tulsa, Okla. radio market normally amount to about 90% of the total listening; the stations excluded from the Tulsa, Okla. radio market (educational stations and those mentioned by call letters in the preceding paragraph) normally amount to only about 10% of the total listening in any one ARB report.

This analysis does not, therefore, deal with stations reported in the ARB which are not indigenous to the geographic marketing area. For example, KGGF, Coffeyville, Kan. has a small audience reported in the Tulsa, Okla. ARB but it is by all standards at Coffeyville, Kan. radio station.

b. Individual Station Comparison—Shares

Stations	Oct/Nov 1967	Call Letter Change	Oct/Nov 1975
KAKC (AM)	27.0		8.5
KAKC-FM	—		3.0
KBJH (FM)	—		.4
KELI (AM)	8.1		10.8

Stations	Oct/Nov 1967	Call Letter Change	Oct/Nov 1975
KFMJ (AM)	—		1.6
KKUL (FM)	—		2.8
KRAV (FM)	5.4		6.4
KRMG (AM)	27.0		21.5
KTOW (AM)	5.4		2.2
KGOW (FM)	—		.4
KVOO (AM)	16.2		18.2
KRMG-FM	—	KWEN (FM)	7.0
KWPR (AM)	—		1.0
KXXO (AM)	—		1.8
KMOD (FM)	—		7.2
Other	10.9		7.2
	100.0%		100.0%

c. Consolidated Comparison—Shares

	Oct/Nov 1967	Oct/Nov 1975
AM	83.7	65.6
FM	5.4	27.2
Other	10.9	7.2
	100.0%	100.0%

d. Comparison of AM/FM—Percentage of Increase

	Oct/Nov 1967	Oct/Nov 1975	Increase
AM	93.9	70.7	— 24.7%
FM	6.1	29.3	+ 380.3%
	100.0%	100.0%	

e. *The Emergence of Top Rated Specialized Stations in Tulsa, Okla.*

In 1967—Tulsa was dominated by three AM stations (*two* of them general service) which accounted for 79% of the listening in the Tulsa radio market.

Station	Type	Share
KRMG	General Service	30.3%
KAKC	Music for Young People	30.3%
KVOO	General Service	18.2%

In 1975—it took six stations to account for 79% of the listening in the Tulsa radio market but two of the six were FM and only *one* of them was general service.

Station	Type	Share
KRMG	General Service	23.5%
KVOO	Music for Older People	19.6%
KELI	Music for Young People	11.6%
KAKC	Music for Young People	9.2%
KMOD(FM)	Music for Young People	7.8%
KWEN(FM)	Music for Older People	7.5%

3. Other Radio Markets in the U. S.

It can be demonstrated in market after market in the rest of the United States that FM has grown from a secondary medium to the point of achieving near parity with AM in many communities.

In markets like Washington, D.C. where FM started early, FM will soon overtake AM. In markets like Tulsa, Okla. where FM started late, FM listening is just now beginning to boom.

Even with a much lower rate of increase, FM is bound to overtake AM in all the major markets probably before 1980 because of increased conversions in car radios and improved FM transmission systems.

Whether or not FM transmissions are, in fact, that much better than AM is irrelevant since the audience *thinks* that FM is superior and that FM is a qualitative improvement and *that* perception will sustain FM's continued growth and will bring about a shifting of positions that will afford many AM stations in the major and medium markets new opportunities for specialized formats.

B. *Monitor of Washington, D.C. and Tulsa, Oklahoma Markets, Spring 1976*

1. Preface on the Nature of the Radio Medium and the Hazards of Giving Names to Radio Formats

Radio's power is its unique capability of communicating not only on a conscious but also on a below conscious level where it affects the memory, imagination and state of mind of the listener.

Radio is generally perceived as a sound medium and is compared most often to television which is a sight, sound and motion medium.

But, because of radio's capability of communicating on a below conscious level and because of its low intensity and essentially passive nature, radio should not be perceived as the sound medium.

Radio is a personal and private environmental medium.

Unlike television which is the most creative medium for the most passive audience, radio is the most passive medium for people who are physically and/or mentally active and, therefore, most physically and/or mentally creative.

Radio's effects on people are more like the environmental effects of light and warmth than other media.

Radio tends, therefore, to move its listeners to higher levels of activity and creativity.

It is no wonder then that protests have increasingly accompanied format changes because both conscious and below conscious adjustments are forced upon the listener and his levels of activity and creativity are directly affected.

With such an invisible and sensitive medium operating in speeded-up cultural time frames, any resort to giving names to radio formats is practically useless from any analytical standpoint.

What, for example, does "middle of the road" mean? (The term "mid-road" connotes a slightly more youthful image through the mere sparseness of terms.)

Before the fragmentation of the radio spectrum, "middle of the road" implied a radio station that played music by Frank Sinatra and Peggy Lee.

Today "middle of the road" could describe widely disparate styles. Glen Campbell is "country" but also "middle of the road," Gladys Knight and the Pips are "R&B" but also "middle of the road," John Denver is "folk" but also "progressive" and "middle of the road," Donny Osmond is "bubble gum" as a soloist but when accompanied by Marie Osmond becomes "middle of the

road." Percy Faith is "beautiful music" but also "middle of the road."

There are now not only "country" stations and "progressive" stations but also "progressive country" stations; not only "soul" stations but "black progressive" stations and "disco" stations not to mention "gospel" and "jazz" stations; not only "all news" stations but "news and information" stations and "news and talk" stations.

The single strongest feature of one format married to the single strongest feature of another format will breed a third format, e.g., "country" + "pop" = "country pop."

Owing to this confusion in terms, people in the industry describe a radio station by its demographic characteristics. Thus, an average "progressive" station may be defined as one with programming that appeals to a primary audience of men 18-24 and a secondary audience of teens, women 18-24 and men 25-34—probably tending to be single or married without children—white—some college—the product of the suburban middle class.

But today's "progressive" (or "boutique rock" or "album oriented" or "album rock") format would convert into a "middle of the road" format ten years from now if today's "progressive" station stays in touch with its current audience because today's 18-24-year-old will be 28-34 years of age ten years from now. That is the classic "middle of the road" configuration.

Thus, a station can, in fact, change format by being consistent through the simple passage of time.

Or, a station can change format overnight by rolling the clock ahead (or back) through the sudden change in its programming.

Radio has always operated freely not only to allow the listener to switch to another station but also to allow the station to switch to other listeners.

2. The Selection of Washington, D.C. and Tulsa, Oklahoma for Monitoring Purposes

To document the diversity of American radio today the writer felt it was necessary to describe the programming of all stations in two important but different markets. Washington, D.C. and Tulsa, Okla. were selected for the following reasons: One is a major market and one is a medium market; one is located in the northeast and one is located in the southwest; one has a large black population and one does not; one has a great news orientation and one does not; finally, the writer had some advance familiarity with both making the task easier.

3. Monitor of Washington, D.C.

The monitor of the Washington radio market took place three days, March 9, March 10 and March 16, 1976.

The writer conducted the monitor in a hotel room in the International Inn which is located at Thomas Circle in the Washington business district.

Depending on the nature of the programming, each station was tracked anywhere from an hour to 15 continuous minutes. The general service stations required greater periods of time than the specialized stations. The popular Hardin and

Weaver show upon which WMAL builds the rest of its programming was given an hour and a half of time. Because of the complexity of the news stations, greater amounts of time were spent listening to them. On the other hand, smaller amounts of time were given to the highly specialized stations because of their relative predictability.

In the cases of the general service stations, where a variety of different programs were on during the day, the writer also contacted the station by telephone to get specific information on the day-parts he was unable to listen to because of the limitations of time.

At the outset, it must be kept in mind one person's perception may be quite different than another's when discussing and describing programming matter even if those persons are experts in the radio programming field. It is the nature of the subject matter and the essential difficulty in attempting to categorize program formats for policy purposes.

For this reason, the descriptions that follow are intended for illustrative purposes and not to show with magnified accuracy totally clear details of each piece of the mosaic. The writer not only recognizes that others might use different descriptive terms to cover certain programming details but submits that the possibility merely underscores the truly subjective and intricate concept "radio format" really represents.

Owners, managers and programmers are as concerned about their public images as they might be about their grandchildren—that is, they can do no wrong. To characterize the style of a news

station as "single anchorperson voices everything" is like saying to a proud grandfather—"just another baby."

Each station is described in three paragraphs: Paragraph (a) describes the "material," i.e., music, news, sports, etc.

Paragraph (b) describes the "structure," i.e., how the material is organized in the hour or the program day.

Paragraph (c) describes elements of "style," i.e., reading and writing style, the "sound," the "pace."

a. *Washington Stations*

	Station Call Letters	Power		Frequency	City of License
		Day	Night		

(1) WUST (AM) 1,000 — 1120 kHz Washington, D.C.

(a) Religious programs and Bible music offering inspiration and comfort for Washington's black community; Mutual Black news; a phone-opinion listener call-in between 8:00AM-9:30 AM.

(b) General service—different programs at different times.

(c) Evangelical fervor, e.g., "This has been the Hour of Alert Broadcast with God's 20th Century Prophet Elder Rufus Settles with a message to the nation. Your support is greatly needed to continue this soul-stirring faith outreach."

(2) WFAX (AM) 5,000 — 1220 kHz Falls Church, Va.

(a) Religious programs.

(b) Quarter-hour and half-hour religious programs follow one another.

(c) Evangelical fervor mixing religious faith and patriotism, e.g., parchment copies of the Declaration of Independence are offered as a premium.

(3) WGMS (AM) 5,000 1,000 570 kHz Bethesda, Md.
WGMS-FM 20,000 20,000 103.5 MHz Washington, D.C.

(a) Fine arts programs and classical music with some opera and ballet; personalities (Pete Jamerson and Renee Channey) in drive-times; luncheon at Kennedy Center interviews; special programming weeknights, 8:00PM-11:00 PM; news and stock market reports; special features (wines).

(b) General service—different programs at different times.

(c) Washington's arts station appears to appeal to a more discriminating person.

(4) WRC (AM) 5,000 5,000 980 kHz Washington, D.C.

(a) "All News, All Day, Every Day." Heavy reliance on NBC's News and Information Service for national and world news; local news on the hour and half hour; weather, traffic, shuttle reports.

(b) National NIS feeds at :06, :15, :36 and :45 add up to approximately 50 minutes per hour with ten minutes provided for local news.

(c) Dual anchorpersons voice national NIS news; single anchorperson voices local "Live News 98." Somewhat formal reading style.

(5) WAVA (AM) 1,000 — 780 kHz Arlington, Va.
WAVA-FM 50,000 50,000 105.1 mHz Arlington, Va.

(a) "News When You Want It." Local Arlington and Alexandria news, Washington news, national and world news; some local actualities but, more often, syndicated actualities; "WAVA Weather;" "Skywatch 78" traffic.

(b) News—locally originated throughout the day.

(c) Single anchorperson voices everything.

(6) WTOP (AM) 50,000 50,000 1,500 kHz Washington, D.C.

(a) "Newsradio 15." CBS national and world news on the hour; other CBS news, sports, commentary and features during the day; locally originated news most of the rest of the time; Frank Herzog sports; Louie Allen and Gordon Barnes weather; Bob Dalton business news; AP audio service.

(b) News—locally originated with CBS feeds on the hour.

(c) Dual anchorpersons on "Newsradio 15" in drive-times only. Somewhat formal writing and reading style.

(7) WJMD (FM) 50,000 50,000 94.7 mHz Bethesda, Md.

(a) "Twenty Four Hours a Day in Stereo —WJMD." Standard songs ("Stardust," "What Now My Love," "People," "Solitude"). Medium tempos. Some vocals. Little news. No personality disc-jockeys.

(b) Music and commercials are clustered.

(c) No back-announcements by the announcers. (A back-announcement re-

fers to giving the artist and song credits at the end of the music, e.g., "Selections in the past fifteen minutes included Percy Faith with 'Moonglow,' Frank Sinatra with 'Try a Little Tenderness,' James Last with 'Theme from Exodus,' and Peggy Lee with 'Don't Smoke in Bed'.")

(8) WEZR (FM) 50,000 50,000 106.7 mHz Fairfax, Va.

(a) "Easy Radio." Standard songs ("This Is My Song," "Around the World," "Charade," "Everybody Loves Somebody"). Medium tempos. Some vocals. Little news. No personality disc-jockeys.

(b) Music and commercials are clustered.

(c) Announcers give back-announcements.

(9) WGAY (AM) 1,000 — 1050 kHz Silver Spring, Md.
WGAY-FM 50,000 50,000 99.5 mHz Washington, D.C.

(a) "All Day All Night All Stereo Music on WGAY 99.5 FM in Washington." Standard songs ("Wonderful, Wonderful," "It Hurts So Bad," "I Won't Last a Day Without You," "My Heart Stood Still"). Medium tempos. Few vocals. Some news. No personality disc-jockeys.

(b) Music and commercials are clustered.

(c) Announcers give back-announcements. Hi-quality audio and separation.

(10) WMAL (AM) 5,000 5,000 630 kHz Washington, D.C.

(a) "Radio 63 WMAL." Heavy personality with Hardin and Weaver's morning show. Two-man team greatly involved

with community. They report the personal activities of their friends and regular listeners, provide church and club information, kid their commercials, do voices and numerous sketches. Hardin and Weaver are self-described as being for "the guy with two cars, ungrateful kids and a house with a mortgage and crab-grass." Personality continues in afternoon with "Two for the Road." Jazz expert Felix Grant holds down evenings. WMAL carries some ABC-1 news, has some local news, plays wide range of music.

(b) General service—different programs at different times.

(c) Ambience is friendly, folksy, funny.

(11) WPIK (AM) 5,000 — 730 kHz Alexandria, Va.
WXRA (FM) 50,000 50,000 105.9 mHz Woodbridge/
Alexandria, Va.

(a) Country music superstars (in one twenty-minute period, Billy "Crash" Craddock, Sonny James, Loretta Lynn, Brian Collins, Moe Bandy, Dottie West); folksy-style announcers; Mutual news.

(b) Music with news on the half hour.

(c) Very easy-going pace and interaction between music and disc-jockey.

(12) WDON (AM) 1,000 — 1540 kHz Wheaton, Md.

(c) Country music; locally produced commercials.

(b) Mostly music.

(c) Rapid-fire pace by disc-jockeys interacting with music.

(13) WASH (FM) 22,500 22,500 97.1 mHz Washington, D.C.

(a) Upbeat pop music but no hard rock. Eddie Gallaher, long-time Washington personality, is morning man; emphasis on local news; Jim Simpson does sports.

(b) Music with news every hour except for drive-times when news is presented twice an hour.

(c) Personable disc-jockeys; hi-quality audio processing gives WASH excellent fidelity and separation.

(14) WEEL (AM) 5,000 500 1310 kHz Fairfax, Va.

(a) "Northern Virginia's Golden Wheel." Golden oldies. Strong community involvement. Woodie West weather.

(b) Mostly music.

(c) Neighborly comments by disc-jockeys between songs.

(15) WWDC (AM) 5,000 5,000 1260 kHz Washington, D.C.

(a) Regular morning show host was on vacation. Bright rock oriented pop music but no "teen" or "energy" accents. ABC-E news actualities presented in hourly news. Helicopter traffic reports were not on the day heard. Music and disc-jockeys the rest of the day.

(b) Music, chit-chat and contests with news on the hour.

(c) Disc-jockeys set a bright, chatty pace.

(16) WKYS (FM) 50,000 50,000 93.9 mHz Washington, D.C.

(a) "Disco Stereo 93 KYS." Rhythm and Blues style music plus selections be-

ing played in area discos. Modest personality involvement. NBC news.

- (b) Music with news on the hour.
- (c) Washington's crossover music station with appeal to blacks and whites.

(17) WOOK (AM) 1,000 250 1340 kHz Washington, D.C.

- (a) "Black Gold." Black music with black disc-jockeys.
- (b) Mostly music.
- (c) Tight production with heavy echo in audio system.

(18) WMAL (FM) 50,000 50,000* 107.3 mHz Washington, D.C.

- (a) Familiar rock music but no "heavy metal" or "glitter." * ABC-FM news.
- (b) Music and commercials are clustered with news at :15.
- (c) Formal disc-jockey presentation.

(19) WEAM (AM) 5,000 5,000 1390 kHz Arlington, Va.

- (a) "The Station with the Albums." Bright adult album rock music. ABC-C news.
- (b) Music and commercials are clustered.
- (c) Free-spirited, conversational disc-jockeys.

* "Heavy metal" and "glitter" characterize the androgynous, extravagant and noisy rock bands popular among older teen-age boys and young men who tend to aggregate them in the same general class as comic book fantasy figures such as "Spider Man" or TV heroes such as "The Six Million Dollar Man."

(20) WHFS (FM) 2,300 2,300 102.3 mHz Bethesda, Md.

- (a) Hard rock 'n roll music with "heavy metal" and "glitter." Unfamiliar cuts by hip, culturally appropriate groups, "The Hummingbirds," "The New Riders of the Purple Sage," "Kingfish."
- (b) Mostly music—free-form sound, i.e., the disc-jockey creates the impression even he doesn't know what's coming next.
- (c) Culturally appropriate music and disc-jockeys.

(21) WHUR (FM) 24,000 24,000 96.3 mHz Washington, D.C.

- (a) "Music with a Message on Your Ebony Lifestyle Station." Black folk, black progressive and black jazz music. Talk features and news addressed to the hip black community.
- (b) Music and talk—free form.
- (c) Racially aware disc-jockeys.

(22) WWDC (FM) 50,000 50,000 101.1 mHz Washington, D.C.

- (a) Album rock music by superstars. Simulcasts WWDC (AM) morning show. ABC-E news.
- (b) Music and commercials are clustered.
- (c) Youthful sounding disc-jockeys play a lot of music with a minimum amount of interruptions.

(23) WMOD (FM) 50,000 50,000 98.7 mHz Washington, D.C.

- (a) Music mix is about two "golden oldies" to one current.
- (b) Mostly music.

- (c) Hi-energy disc-jockeys talk over the music and "keep it cooking" * most of the time.

(24) WOL(AM) 1,000 250 1450 kHz Washington, D.C.

- (a) "The Real One, WOL." Washington's black hit music station ** (soul music by Earth, Wind and Fire, Diana Ross, Kool and the Gang) with talented "jive-talking" disc-jockeys. "Call It and Claim It" contest feature.

- (b) Mostly music.

- (c) Hi-energy disc-jockeys keep it cooking and stop only for commercials and news bulletins. Heavy echo in audio system.

(25) WPGC(AM) 10,000 — 1580 kHz Morningside, Md.
WPGC-FM 50,000 50,000 95.5 mHz Morningside, Md.

- (a) "W-P-G-C — Where-People-Get-Cash." Washington's white hit music station with a continuing flow of cash give-aways to listeners calling in to win. Current contest is "The Older You Are the More You Can Win." Object of this game is for listeners to be able

* "Keeping it cooking" means the disc-jockey doesn't allow the music to stop behind his voice, thus producing a "non-stop" musical sound.

** A "hit music station" is one that plays the top of the best-selling singles charts in a high rotation to get a mass audience listening for short or medium intervals. It does not operate selectively but tries, as much as possible, to mirror current public tastes. Thus it tends to appeal more strongly to different minority tastes at different times, and thus is constantly changing its musical format as far as types of selections are concerned.

to name the last four songs and then, on cue, call in to qualify. Winner gets three times his age in dollars.

- (b) Mostly music and contest involvement. WPGC is, by far, Washington's most contest oriented station.

- (c) Bright pace by disc-jockeys who do most of their business over music to keep it cooking most of the time.

4. Washington, D.C.—A True Radio Market

The result of the monitor indicates Washington is a highly specialized market with the stations not only acting but interacting among themselves on a continuing basis to achieve significant or improved audience levels.

Because of its particular ethnic characteristics and rich cultural life, Washington is a highly individualized radio market. The nation's capital is fortunate in having so many different stations going in so many different and, in some cases, highly experimental directions. The fragmentation of the market is considerable but the evolutionary process is not abating. A number of "holes" have not been filled.

When there is movement into these "holes" the whole market will adjust to the important changes.

Washington is, from a competitive and "product difference" standpoint, a limited and regulated but true market—operating freely without government interference in determining public tastes.

5. Monitor of Tulsa, Oklahoma

The monitor of the Tulsa radio market took place on one day, March 30, 1976.

The writer conducted the monitor in a hotel room in the Mayo Hotel which is located in downtown Tulsa.

As was the case in Washington, D.C., each station was tracked anywhere from one hour to 15 continuous minutes.

a. Tulsa Stations

	Station Call Letters	Power		Frequency	City of License
		Day	Night		
(1)	KFMJ (AM)	1,000	—	1050 kHz	Tulsa, Okla.

(a) "Thanking You For Making Us Tulsa's No. One Gospel Station."

(b) One half-hour religious program follows another.

(c) The Bible is the cornerstone of this ministry, and KFMJ's preachers use scripture as the word of God.

(2)	KBJH (FM)	100,000	100,000	98.5 mHz	Tulsa, Okla.
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(a) "Gospel Music Radio." A joyous presentation of gospel music with good-neighbor phone call-ins, news and other appropriate features.

(b) Improvisational and spontaneous flow of music, listener and disc-jockey interaction.

(c) KBJH perceives religion as a celebration not as a solemn rite.

(3)	KWEN-FM	100,000	100,000	95.5 mHz	Tulsa, Okla.
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(a) "KWEN Stereo 95." Standard songs ("Michele," "The Real Thing," "I Wish You Love," "Once In My Lifetime"). Medium tempos. Few vocals. Little news. No personality disc-jockeys.

(b) Music and commercials are clustered.

(c) No back-announcements by the announcers.

(4)	KVOO (AM)	50,000	50,000	1170 kHz	Tulsa, Okla.
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(a) "Tulsa's Only Full-Time 50,000 Watt Radio." KVOO is a country music station with extensive news coverage (10 minutes on the hour, 5 minutes on the half hour every morning). Frequent brief traffic reports by mobile reporters. ("Four-car accident at 49th and Peoria.") Morning disc-jockey refers to children listening as "cowboys" and "cowgirls." Reads them the elementary school menu.

(b) Music with news on the hour.

(c) Folksy, straightforward and friendly disc-jockey style.

(5)	KTOW (AM)	500	250	1340 kHz	Sand Springs, Okla.
	KGOW-FM	3,000	3,000	92.1 mHz	Broken Arrow, Okla.

(a) "Proud Country Entertainment Radio for Tulsa County, Oklahoma." Duplicates its AM programming on FM. Music by old-line country stars. One hymn per hour. Local advertisers voice their own commercials.

(b) Music with news on the hour.

- (c) Easy pace by mid-day woman disc-jockey.

(6) KRMG (AM) 50,000 25,000 740 kHz Tulsa, Okla.

- (a) KRMG provides a wide range of music, news, service features and fun (trivia questions with East-West all-star tickets as prizes) by its personality disc-jockeys. The station is heavily news oriented in morning drive-time periods; it provides exclusive helicopter service and is an outlet for community announcements of club, church and school events, many of which ("Spring Fever") are voiced by the people themselves.

- (b) Music, with news on the hour and extra editions in drive-times.

- (c) Neighborly style by disc-jockeys with moderate-to-bright music and staging.

(7) KWPR (AM) 500 — 1270 kHz Claremore, Okla.

- (a) A suburban day-time station with a mixed bag of country, pop and rock music. 15 minutes of local news daily at 7:00 AM, 12:15 PM, 5:00 PM. ABC-I network. Oklahoma News network.

- (b) Mostly music and community news.

- (c) Folksy presentation.

(8) KRAV (FM) 100,000 100,000 96.5 mHz Tulsa, Okla.

- (a) "FM 96," recently changed from taped music service, features soft rock, current singles and oldies with a few album cuts and live disc-jockeys. News twice an hour in morning drive-time.

- (b) Music with news at :55.

- (c) Bright disc-jockeys and jingles. ("A Tulsa morning—FM 96.") Excellent audio system provides crisp, quality sound.

(9) KXXO (AM) 5,000 1,000 1300 kHz Tulsa, Okla.

- (a) KXXO plays album cuts by rock superstars. News is presented every 20 minutes 6:00 AM - 9:00 AM. KXXO simulcasts KMOD programming beginning at 7:00 PM.

- (b) Mostly music with some news and community affairs announcements.

- (c) Disc-jockeys are adult. They stress the music played exclusively on KXXO.

(10) KAKC (FM) 97,000 97,000 92.9 mHz Tulsa, Okla.

- (a) "All Super Solid Gold" tape service features the rock music of the 50's and other "gold" music.

- (b) Mostly music with some random news and editorial opinion.

- (c) Pre-recorded voice announces songs.

(11) KMOD (FM) 50,000 50,000 97.5 mHz Tulsa, Okla.

- (a) Hard rock 'n roll music with an ineffable "country" flavor not apparent in similar stations in the northeast.

- (b) Music and commercials are clustered with news at :50.

- (c) Culturally appropriate music and disc-jockeys.

(12) KKUL(FM) 100,000 100,000 103.3 mHz Tulsa, Okla.

- (a) One of two of Tulsa's FM album rock stations. Hard rock 'n roll music with country and even R&B accents (The Who, The Band, Little Feat, Rufus). Carries ABC-FM news. Night-time show features the new album of the day. Morning contest feature involves guessing the time the DJ's overdue wife has her baby.
- (b) Mostly music—free-form sound.
- (c) Culturally appropriate music and disc-jockeys with distinctive communal ambience.

(13) KAKC(AM) 1,000 500 970 kHz Tulsa, Okla.

- (a) One of two of Tulsa's AM hit music stations, KAKC uses "Free Money Call," a cash-call game in which listeners called must read back the winning amount (\$2,058.47) to win. A free prize of a "Disco Party" is also promoted.
- (b) Mostly music and contest involvement.
- (c) Disc-jockey presentation is bright. Jingles are used to introduce the songs.

(14) KELI(AM) 5,000 5,000 1430 kHz Tulsa, Okla.

- (a) One of two of Tulsa's AM hit music stations. KELI uses promotional phrase, "The More You Listen the More You Can Win." Sponsors Doobie Brothers Tulsa concert. Promotes "Track the Tunes" contest and "Keli" car window stickers.

- (b) Mostly music and apparent contest involvement, with news and traffic reports and "Employment Central" feature during the day.
- (c) Disc-jockeys are restrained—apparently reading from cue cards. Their voice levels do not appear to override the music.

6. Tulsa, Oklahoma—A True Radio Market

The result of the monitor indicates Tulsa is beginning to take on a greater degree of specialization than ever before.

Although Tulsa has not developed to the extent that Washington, D.C. has, it is clear that FM penetration, undeveloped until recent years, will reach the 50% level not later than 1980.

7. A Useful Theorem

The following theorem was deduced and became increasingly self-evident during the experience of listening and analyzing the Washington and Tulsa markets:

In a competitive situation—the greater the number of stations the greater the specialization.

C. Probable Effects of Governmental Intervention in Format Changes

1. General Impressions of Washington, D.C. and Tulsa, Oklahoma Radio Markets

After listening to both markets, the writer very seriously questions the ability of any individual or group to begin to think of providing the kinds of creativity and innovation already operating in Washington, D.C. and Tulsa, Okla. and wonders

what advantage, not already real or implicit in existing programming "holes," could possibly be provided by a programming jurisdiction or watchdog group.

2. Current Fears of Government Intervention

In the writer's experience, there are already instances in which experimental new formats have been rejected by licensees at least in part due to a fear that the very novelty and special appeal of the format would be immediately marked as an "endangered species."

The problem is often resolved in a predictable manner: "Be prudent," "Be safe," "Don't take the risk," i.e., "Don't be experimental," "Don't be creative." The easy course becomes the one taken. It also becomes the least likely to attract new audiences and the most likely to shroud creativity and stifle diversification particularly in those forms, e.g., all news, classical, ethnic, etc., requiring the greatest measure of freedom of expression and creativity to achieve commercial viability.

Uncertainty is the nature of experimentation and commercial failure in highly specialized efforts should not be punished by economic extinction.

Aside from the demoralization of creative programmers which would result from any "prior approval" requirement by the government to modify or change formats at any time during the term of the license (and the subsequent loss of many of those people to other media not controlled and managed by the government), any action which would tend to inhibit or prevent changes would also inevitably tend to reverse the trend of the past decade.

Any highly specialized station unable to modify or change format freely will eventually fall behind in ratings because it will be unable to meet the changing needs and tastes of its audience. Its audience will tend to look elsewhere.

As fashions in entertainment continue to change, other highly specialized stations unable to modify or change format to meet changing needs and tastes will also fall behind.

(Operators subtle enough to modify or change without drawing attention or challenges from listener groups would be like the survivors of a fire who somehow managed to exit out the back door while others, no better or worse but only less quick witted, are left behind to suffocate.)

At this point, less specialized and general service stations would presumably receive permission from the government to modify or change to meet the changing needs and tastes.

This would be done by presenting different programs at different times—the distinctive characteristic of general service stations.

General service radio would become common practice again because general service stations could presumably program more freely. The end result would be a gradual shrinking of the market.

3. The Value of the Current System

General service is not convenient for most listeners who opt for the immediacy of programming to their own moods from a variety of specialized stations. (Exclusive listening to one station is not a normal listening habit.)

Everyone in the industry is aware of the decline of the music and news stations when stations spe-

cializing in music *or* news came into the marketplace.

It is felt to be far superior to have all the radio listeners able to switch immediately among as wide a variety of formats as possible than to impose radio listening guide newspaper columns and magazines on the public. (There is a substantial question in the writer's mind whether or not radio, because of its low intensity and environmental nature, naturally lends itself to the print medium.)

It is felt the best system is to have all the radio listeners able to switch immediately among as wide a variety of formats as possible. Indeed, the superiority of specialization to general service can be demonstrated by the great increase in listening in the last decade.

In Washington, D.C., for example, the increase in 12+ population was 28.1% between Oct/Nov 1967 and Oct/Nov 1975. This compares to the much larger increase in listening in the same period—49.5%.

In Tulsa, Okla. the increase in 12+ population was 33.5% between Oct/Nov 1967 and Oct/Nov 1975. This compares to the much larger increase in listening in the same period—80.8%.

PART III. YARDSTICKS USED IN RADIO FORMAT DEVELOPMENT

Radio programming encompasses a body of knowledge largely passed along by word of mouth. (There is little valuable literature available to programmers and, because of the ephemeral nature of the medium, books that are published are out of date by the time they are printed.)

Because of the verbal nature of the knowledge and the independent personalities of most programmers who love radio because they are able to express themselves freely and creatively in it, there is no one recognized authority whose definitions, criteria and methodology are accepted. The leaders in radio programming, as inventive and original in their fields as their creative counterparts in film, TV, literature and the other arts, do not, however, leave behind an oeuvre for students to analyze. There is only a constant evolution of the programming art and myths and memories of the legendary stations of the past.

Because of the somewhat imperceptible characteristics of the radio medium, i.e., its low intensity and environmental nature, it becomes difficult if not impossible to develop criteria to measure it.

The closer one gets into questionable areas the more additional questions seem to be presented. The more one probes—the more decisions need to be made.

There is no common language for definitional purposes. Words have different meanings at different times in different parts of the country. The very word "format" has at least three different meanings: 1) the general style of the station, 2) how the material elements are organized in relation to each other, and 3) the set of rules the disc-jockey must follow.

Only against the background of the foregoing cautionary notes is it possible for the writer to proceed to his own personal analysis of the medium. While this method of analysis is one which he has found useful in programming radio stations, it must be kept in mind that the yardsticks are his own. They are not accepted by the industry as definitive since there are no such definitive yardsticks utilized throughout the industry.

All radio formats consist of three components—material, structure and style.

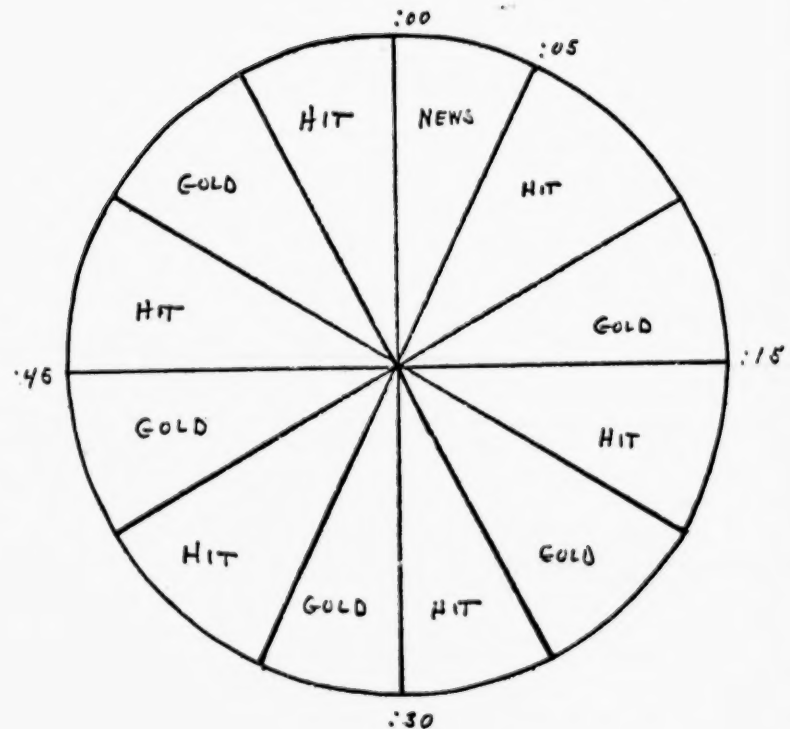
Material is simply what is broadcast on the radio station and what attracts people to tune in and listen. Examples of material are music, personality comments, world and local news, interviews, time, weather and traffic bulletins, business news, farm news, sports news, sports play-by-play, news commentary, editorials and documentaries, listener opinions, contests, talks, speeches, sermons, special events, etc.

Material also includes commercials, promotional announcements and public service announcements which, with specific exceptions, are not inducements to tune in and listen.

Structure is the length of the material and its position in the hour relative to other material.

Structure is often represented in the form of the following "hot clock" example used as a working tool by programmers:

"HOT CLOCK"



COMMERCIALS AT :15, :30 & :45

The "hot clock" tends to make the station sound the same every hour because the material elements are presented at exactly the same times. For example, in a contemporary format using a "hot clock," the category of songs, e.g., oldies, assigned to be the first event after the news tends, over a duration of time with heavy listeners, to become associated with the news and, therefore, becomes somewhat predictable and eventually dull.

Structure can also be determined by a sequence not confined to a specific interval of time. For example:

First 40 minutes	Sequence	Next 40 minutes
H R G H G G H R		REPEAT

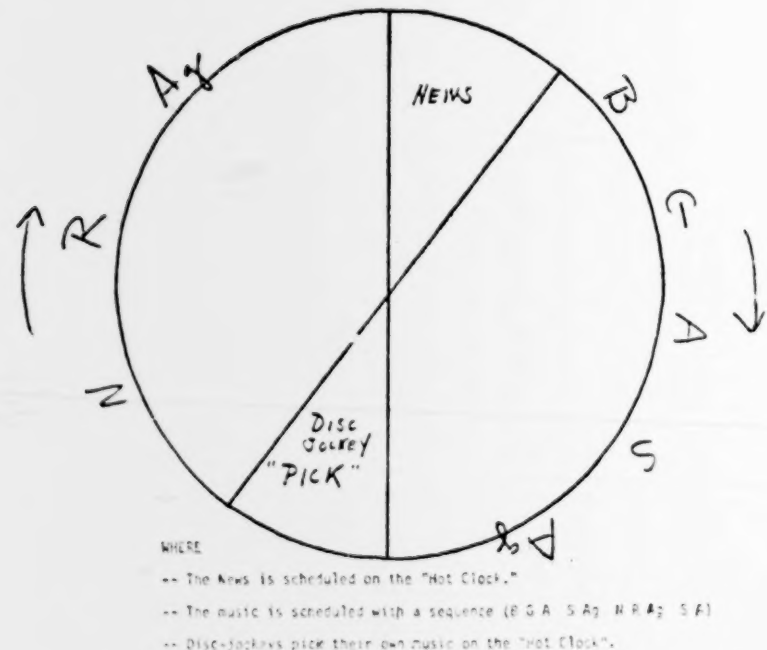
Key: H=current single; R=recent single; G=old single

The beauty of the sequence is its apparent unpredictability (the next song is always a surprise) and total consistency (songs do not have to be added or dropped because of different commercial levels).

Because of the improvisational capabilities of the medium, structures can also be totally spontaneous or free form, i.e., unstructured or abstract.

But structures can also be eclectic. It is not uncommon to develop a structure incorporating an hourly "clock," a sequence and free-form spontaneity in the same time frame:

AN ECLECTIC STRUCTURE



Style is the specific personality of each piece of material and the overall personality of the structure which houses the material.

Style dictates everything that goes on the air—the tempo and the familiarity of the songs—the urgent or conversational presentation of the newscaster—the mixing of the music—the use of logos and jingles and other staging—the actual sound of the technical facility.

Any format modification involves some change in material, structure or style or any combination of the three.

A format modification (as distinct from a radio station format change) can be as simple as substituting one category of songs for another in the hourly "hot clock"—lengthening the hourly newscast by a minute—getting the disc-jockeys to be more conversational when reading commercials—putting a new jingle package on the air—converting a "hot clock" into a sequence—changing morning personalities—raising or lowering the commercial levels—providing a mobile unit for traffic reports—carrying the tournament basketball finals—originating programming from the flower show, etc.

To demonstrate the practical problems of determining the difference between a format modification and a radio station format change, the following totally hypothetical but entirely plausible examples are presented:

EXAMPLE #1

A limited facility country music station had a serious decline in ratings because of new FM competition.

A majority of those who deserted the station were younger people so it had an older than average audience profile.

Management studied the problem and decided it had to lower its demographics to recoup.

It eliminated many old-line country artists, e.g., Furlin Husky, Hank Williams, Sr., Tammy Wynette, and concentrated on a new breed of country artists, e.g., Linda Ronstadt, Glen Campbell, Olivia Newton-John, Willie Nelson and Waylon Jennings. Thus, the emphasis of the lyrics of the songs shifted from the joys and sorrows of a country person—to the joys and sorrows of the same person whose lifestyle is changing into big city ways.

Greater repetition was also introduced as new songs by the new breed artists were rotated more frequently.

No other changes were made in the material, structure or style.

Immediate audience response was mixed. Younger people loved the change. Older people hated it. One older listener best summarize the complaints: "Until now you used to play hymns and songs about Old Glory. Now it's nothing but sex and dope. You are a hippy station and you are programmed by the devil."

Did the change in the musical material constitute a radio station format change?

EXAMPLE #2

A standard music FM station in a medium-size market had operated profitably for years.

It had featured "mid-road music at the ratio of two instrumentals to one vocal plus five minutes of news and ten minutes of commercials per hour.

In addition it had a morning man who was once a major factor in the market on the FM's sister AM station. On FM he had leeways for humor in the morning drive-time period not given the station's other announcers whose on-air duties were confined to reading musical back-announcements, commercials and weather reports.

In recent years a beautiful music competitor moved ahead in ratings through the acquisition of a nationally syndicated service.

Reduced to second position among adults 25-64, the audience it perceived as its target, management decided to meet the challenge and upgrade.

To that end it decided a locally produced service similar to the nationally syndicated competitor's was the best alternative.

A highly creative program director was sought and hired to create and supervise the on-air sound:

He made the following changes:

- Sets were created which reflected the mood of the moment, e.g., rain songs in a musical cluster for rainy days.
- All vocals were eliminated.
- News was localized but otherwise left intact.
- Commercials were reduced to eight minutes per hour.
- The morning man was terminated.
- The hourly "clock" was reset with clusters of music and commercials to eliminate interruptions.
- Back-announcements were dropped.

Almost all immediate audience response was negative. Genuine hostility was directed against the station for terminating the morning man. Secondary criticism was directed against dropping the back-announcements.

Did the change in personality material and the change in back-announcement style along with the other changes constitute a radio station format change?

EXAMPLE #3

For years a Class II AM station in a medium market enjoyed success by providing a general service format consisting of ten minutes of news per hour, "mid-road" music and a phone-opinion program at night.

A Class I AM station in the market, after years of looking for an answer to its problems, hired a new manager. He put together a format very similar to the Class II AM station's and, within a year, pulled ahead in the ratings.

Devastated by the awakening of the sleeping giant, the Class II AM made a total format change. It moved its phone-opinion program host to the morning drive-time period and acquired five new telephone talk personalities. The station was then promoted as "The Talk of the People."

Two years after the format change the Class II AM's rating position had improved but sales were still not up to expectations because of bad press generated by a former personality who had once used profanity on the air in heated argumentation.

To solve its sales problem, management decided to convert four of the six day-parts from discussion of current issues and topics to specialized subject matter. The new shows included: "Food Talk," "Travel Talk," "Sports Talk," and "The Experts Talk." (The two remaining phone-opinion programs became "Talk Talk.")

Response was immediate. Many praised the station for the alternative subject matter. But others, particularly two ethnic minority groups, attacked the station for showing a lack of courage in avoiding discussion of issues affecting them.

Did the more than 50% change in the subject matter in talk material constitute a radio station format change?

EXAMPLE #4

A "progressive" FM station had been successful since the early 70's playing "heavy" music, i.e., ex-

tended jams by an electric rock band, and pertinent counter-culture rap for a hip lifestyle audience.

Since the end of the Viet Nam war and Watergate, the station's ratings had slipped.

Management decided to modify its image by taking control of the music through a music sequence and required the disc-jockeys to be more objective about the music and less subjective about themselves.

Most of the high-spirited disc-jockeys were unable to make the transition to a more consistent and familiar sound. They either resigned or were terminated.

Ratings improved but response was overwhelmingly negative. A "free speech" movement was organized in the hip community and directed against the station's advertisers.

Did the material, structural and stylistic changes constitute a radio station format change?

EXAMPLE #5

A powerful AM station had for years billed itself as "The Greater West's Great Station for Music, News and Sports."

In addition to "mid-road" music and hourly newscasts, the station carried the complete schedules (except for conflicts) of the local professional baseball, football and basketball teams. It also carried the football and basketball games of the state colleges plus special events including play-off and championship games, The Triple Crown of Golf and re-creations of heavyweight championship fights.

Coverage of sports was not highly profitable, however, and with rising costs (its labor contracts were

the same as those of its sister TV station's), less listener interest in radio play-by-play and the low commercial inventory forced on the station by the pre-emptions in its busiest seasons, the station started to lose money.

Sports were, therefore, cancelled but the rest of the station, i.e., the music and the news, was left intact.

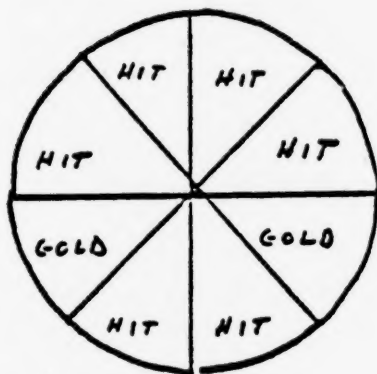
Listener reaction was negative.

Did dropping the sports play-by-play constitute a radio station format change?

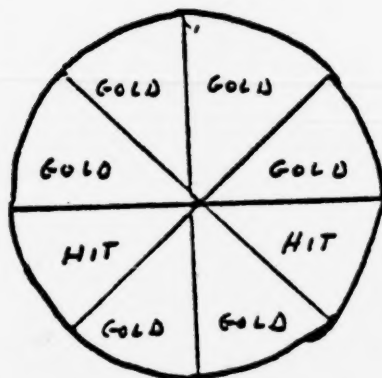
EXAMPLE #6

A contemporary music FM station decided to improve its demographics by changing its music mix from contemporary current to contemporary gold. Changes were made in its hourly "hot clock."

FROM:



TO:



Demographics 18-34 improved but teens moved elsewhere.

Did the change in musical material constitute a radio station format change?

EXAMPLE #7

For years an "old-line" AM station in a medium market had been beefing up its news image by in-

cluding more and more news, sports, weather, traffic, etc. in morning and afternoon drive-time periods and less and less music.

The station finally decided to drop all music and both periods were converted to news and information blocks.

The ratings started to slip. The station went to its listeners and found out they missed the sparkle that a couple of songs an hour provide. As one listener put it, "They took the sting out of all that bad news."

It reinstated the music. Some listeners complained they had been robbed of a unique informational service quite unlike the disc-jockeys heard on every other station in town.

Did taking the music out and then putting it back in constitute radio station format changes?

EXAMPLE #8

A medium-power AM station in a major market with a large "Latino" population hoped to attract some of that audience to its predominately white audience by having a bilingual disc-jockey on from 7:00PM-12:00M who spoke in English but also dropped in Spanish phrases. The disc-jockey, "Salsa Johnnie," played some "hot sauce" music and he was promoted by the other disc-jockeys through the device of their playing one or two "hot sauce" selections per hour with an appropriate promotional announcement for the bilingual jock.

Ratings not only didn't improve at nights but went down across the board. The bilingual jock was terminated and all the "hot sauce" music was dropped.

Did the hiring and the firing of the disc-jockey and the companion changes in music policy represent radio station format changes?

EXAMPLE #9

An FM station in a medium market was an immediate success with an "oldies but goodies" format using the early rock music of the 50's for material. Five years later, with the advent of new fashions in music ("progressive country," "disco," "reggae"), the nostalgia "oldies format was felt to have had it because no new music in that style was available and, in any case, it was felt to be unsuitable because of the change in public tastes.

The station, therefore, switched to a "soft rock" format.

Did the material change in response to the dramatic and sudden change in public tastes constitute a radio station format change?

EXAMPLE #10

A contemporary FM station perceived it sounded like every other rock music station in a major market.

It created a distinctive new sound with the following changes:

- The call letters were dropped except for legal purposes.
- 18 jingles with the logo "Super Q" were scheduled every hour.
- Maximum modulation and echo were built into the audio system.
- Disc-jockeys were instructed to speak louder and faster.

No other changes were made.

Did the changes in style constitute a radio station format change?

In addition to the ten hypothetical examples in the immediately preceding section, the writer closes this report with a comment on another aspect of the radio industry which tends to make the radio format change issue difficult to analyze, i.e., the quality of the local management.

It has been the writer's experience that a change in local managers is often more important than a change in format, inasmuch as a superior manager will improve a poor station and a poor manager will weaken or even destroy a good station.

Assuming a good ownership situation, the quality of the local management is the single most important function in the radio station equation.

Superior management, therefore, represents a qualitative value in the radio station format change issue, i.e., a good rock station is better than a bad rock station and a good classical station is better than a bad classical station.

Logic would also seem to dictate that in an egalitarian society which perceives no one type of format to be inherently superior to another that a good classical station is superior to a bad rock station and that a good rock station is better than a bad classical station.

In other words, it is the local management that determines success not the choice of formats.

The writer strongly believes it is only good local management, motivated by opportunities in the marketplace, that will provide the solution to the radio station format issue by continuing to create new formats to meet the new needs of the listening public.

VI

**ORDERS OF THE
UNITED STATES SUPREME COURT
GRANTING PETITIONS FOR WRITS OF CERTIORARI**

SUPREME COURT OF THE UNITED STATES

No. 79-824

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*

ORDER ALLOWING CERTIORARI

Filed March 3, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 79-825, 79-826 and 79-827 and a total of two hours are allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 79-825

INSILCO BROADCASTING CORPORATION, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*

ORDER ALLOWING CERTIORARI
Filed March 3, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 79-824, 79-826 and 79-827 and a total of two hours are allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 79-826

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*

ORDER ALLOWING CERTIORARI
Filed March 3, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 79-824, 79-825 and 79-827 and a total of two hours are allotted for oral argument.

SUPREME COURT OF THE UNITED STATES

No. 79-827

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*

ORDER ALLOWING CERTIORARI
Filed March 3, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is consolidated with Nos. 79-824, 79-825 and 79-826 and a total of two hours are allotted for oral argument.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Communications Commission and the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-56a), is not yet reported. The Notice of Inquiry and orders of the Federal Communications Commission (Apps. C, D and E, *infra*, 60a-116a, 117a-175a, 176a-196a) are reported at 57 F.C.C.2d 580, 60 F.C.C.2d 858, and 66 F.C.C.2d 78.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979 (App. B, *infra*, 57a-59a). On September 14, 1979, the Chief Justice granted an extension of time within which to file a petition for a writ of certiorari to and including November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the Communications Act of 1934, read in the light of the First Amendment, grants to the Federal Communications Commission the discretion to follow a policy of declining to review entertainment program format changes when a radio broadcast license is renewed or transferred.¹

STATUTES INVOLVED

The relevant portions of the Communications Act of 1934, as amended, 47 U.S.C. 151, *et seq.* are set forth in Appendix F, *infra*, 197a-199a.

STATEMENT

1. This litigation results from a continuing disagreement between the Federal Communications Commission and the court of appeals over the appropriate role of the Commission in supervising the

¹ Although the decision of the court of appeals criticizes the Commission for not disclosing a staff analysis paper prior to issuing its Policy Statement (App. A, *infra*, 14a-15a), we do not understand this to be a ground for the court's ruling (see *id.* at 17a note 24). In the event this Court concluded otherwise, however, we would wish to preserve for review the question whether the court of appeals erred in concluding that the Commission was required to make disclosure of the staff analysis paper prior to issuing its Policy Statement.

selection of entertainment programming broadcast by radio stations. The decision below reaffirmed what has come to be known as the "format doctrine" (App. A, *infra*, 30a note 47), which was developed by the court of appeals in a series of decisions reviewing Commission orders granting applications to assign radio station licenses.² In those decisions, the court of appeals rejected the Commission's determination of the policy that would best serve the public interest in this area. The court held that when the Commission considers an application to renew or transfer the license of a radio station with a unique, financially viable entertainment format, the Commission must consider whether granting the application will involve a change in that format.³ If such a change in pro-

² See *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (en banc); *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Committee (Atlanta) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970). See also *Hartford Communications Committee v. FCC*, 467 F.2d 408 (D.C. Cir. 1972). Section 402(b) of the Communications Act, 47 U.S.C. 402(b), vests exclusive jurisdiction in the United States Court of Appeals for the District of Columbia Circuit to hear appeals from Commission radio licensing decisions. See *FCC v. Columbia Broadcasting System of California, Inc.*, 311 U.S. 132, 133-134 (1940).

³ Most radio stations now broadcast a specialized type or "format" of entertainment programming, *e.g.*, classical music, country music, all news, etc. This trend toward specialized programming evolved as a result of a number of factors, including the need for radio stations to provide a competitive alternative to television and the increase in the number of radio stations from approximately 600 in 1935 to the current total of approximately 8,500.

gramming format is involved, the decisions of the court of appeals require the Commission to determine whether the change would be in the public interest before acting on the application.

In *Citizens Committee to Save WEFM v. FCC*, *supra*, 506 F.2d at 262 ("WEFM"), the court of appeals summarized the teaching of its decisions as follows:

When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may * * * necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the format itself in order logically to support an assignment that occasions a loss of the format.

2. The "format doctrine" was developed by the court of appeals on review of FCC decisions granting individual applications to assign radio station licenses. As a result of the Commission's concern that the broader implications of the format doctrine had not received adequate consideration either by

the court or the agency during the course of this *ad hoc* litigation, the Commission issued a Notice of Inquiry instituting administrative proceedings on the question (App. C, *infra*).

The Commission solicited comments from interested parties on the appropriateness and feasibility of its supervision of the selection of entertainment programming. 57 F.C.C.2d at 584-585. It also sought comments on the First Amendment implications of such regulation. *Id.* at 585.⁴

⁴ When the Notice of Inquiry was issued, Commissioner Robinson summarized his views on the "vexing problem" facing the agency in regulating entertainment program formats. 57 F.C.C.2d at 594-595. He concluded that the teaching of *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), that the Commission should not interfere with competition among broadcasters, continued to reflect wise public policy. He also pointed out what he perceived as acute practical problems in implementing the regulatory standards mandated by the court of appeals:

The standard for "uniqueness" or "diversity"—the diversity that the public wants enough so as to cause it to grumble when it is diminished—is obviously idiosyncratic and subjective. Quite aside from the constitutional objections * * * this subjective element presents intractable difficulties in administration. What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. * * * [B]y the subjective standards that the Court seems to embrace, any format is unique; from

Following public notice and comment, the Commission issued a Policy Statement. The Statement concluded that format regulation of the kind required by the court of appeals' *WEFM* decision was inconsistent with the competitive policies adopted by Congress, presented intractable problems of administration, and was unlikely to provide any significant increase in program diversity over that provided by market forces. 60 F.C.C.2d at 858. In reaching this conclusion, the Commission relied on this Court's decision in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940), which emphasized that

broadcasters are not common carriers and are not to be dealt with as such. Thus the [Communications] Act recognizes that the field of broadcasting is one of free competition. * * *

* * * * *

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

which it follows, all must be preserved. At that thought the mind swims and the heart sinks.

Commissioner Robinson also emphasized the constitutional problems arising from the "format doctrine." He noted that the Commission "will have 'to oversee far more of the day-to-day operations of broadcasters' conduct' than even would have been the case with mandatory access editorial advertising, a reason of apparently constitutional stature in the Supreme Court's holding in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 126 (1973)." 57 F.C.C.2d at 600.

The Commission added that, if "broadcasters are to compete with one another, * * * they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take." 60 F.C.C.2d at 860.

The Commission's Policy Statement noted that publicly available data confirmed that competition provides a statutorily sufficient amount of diversity in radio entertainment programming. 60 F.C.C.2d at 863. The Commission explained that market forces are superior to government regulation in selecting types of entertainment programming that listeners actually prefer, and provide "a precious element of flexibility which no system of regulatory supervision could possibly approximate." *Id.* at 864.

The Commission also analyzed the practical difficulties presented by the holding of the court of appeals, which would require the Commission to determine: "(1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; [and] (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail." 60 F.C.C.2d at 862. The Commission observed that where both the old and new formats were unique, it would be faced with the additional problem of determining which format better served the public interest. The Commission expressed serious doubt about its capacity to determine whether a format is

"unique," and whether reasonable substitutes were available.⁵ With regard to the question whether the public would be "better served" by one popular format rather than another, the Commission found that it had no principled basis for making the required determination. *Id.* at 864.

Finally, the Commission's Policy Statement explained that regulation of entertainment formats raised serious constitutional difficulties. The threat of a hearing that might result from an effort to modify a program format would make the risk "of undertaking innovative or novel programming altogether unacceptable." The Commission found that the practical "obligation to continue service [imposed on broadcasters with a unique format] * * * deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no

⁵ The Commission pointed out that the court of appeals had previously held that this problem could not be avoided by defining formats broadly. The Commission noted that the court had required the Commission to "distinguish progressive rock music from the other species of the rock genre, *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973) * * * [and] to distinguish between 19th Century and 20th Century classical music, [*WEFM*] 506 F.2d at 264 n.28 * * *." 60 F.C.C.2d at 862. The Commission also emphasized that "[w]hat makes one format unique makes all formats unique. * * * Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's 'sound' and that citizens' groups (and alas, appellate judges) call format." *Ibid.*

off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms." 60 F.C.C.2d at 865. Such a scheme of regulation, the Commission concluded, would have a "chilling effect * * * on program innovation * * * [that] would be injurious to the public interest." *Id.* at 864. The Commission added that format regulation would necessarily result in "entanglement in matters that Congress meant to leave to private discretion," and would infringe First Amendment freedoms "because 'a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed.'" *Ibid.*

3. The court of appeals, sitting en banc, set aside the Commission's Policy Statement. The court reaffirmed the rule previously articulated in *WEFM* and rejected the Commission's conclusion that *WEFM* embodied unwise public policy that could not meaningfully increase program diversity.

The court restated the basic premise of its "format doctrine"—"that the Communications Act's 'public interest, convenience, and necessity' standard includes a concern for diverse entertainment programming." App. A, *infra*, 4a. The court added that Congress has "set aside the radio spectrum" to benefit "'all the people' of our richly pluralistic society," not simply "those in the cultural mainstream." *Id.* at 5a. Accordingly, the court concluded that Congress intended in adopting the general "public interest, convenience and necessity" standard of the

Communications Act, that “‘all major aspects of contemporary culture * * * be accommodated by the commonly-owned public resources whenever that is technically and economically feasible.’” *Ibid.*

In an effort to defend the administrative feasibility of its “format doctrine,” the court of appeals asserted that the Commission would not be required to conduct hearings in all cases involving license transfers or renewals. The court noted that it would not be necessary to make a “public interest” determination if (App. A, *infra*, 24a-25a):

- (1) there is an adequate substitute in the service area for the format being abandoned, (2) there is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable.

The court also stated that the Commission has discretion to set standards which would minimize administrative difficulties. It indicated that the Commission could establish “rigorous standards” as to when a *prima facie* case had been made by opponents of the format change, or establish broad format categories rather than narrower ones, thus reducing the likelihood that an abandoned format could be proven “unique” (App. A, *infra*, 29a-30a). The court added that the Commission could be even more “innovative” by basing its decision as to whether the public interest was implicated by a station’s change of programming on “the existence of significant and bona fide listener protest.” *Id.* at 30a.

Judge Bazelon concurred in the court’s decision to set aside the Policy Statement, concluding that the Commission had failed to make disclosure of a staff analysis paper prior to issuing the Statement (App. A, *infra*, 41a). However, Judge Bazelon specifically noted his disapproval of the majority’s “unwillingness to give appropriate deference to the Commission’s judgment” on the substantive questions before the court. *Ibid.* He asserted that the majority opinion had “virtually confine[d] the FCC to a spectator’s role in formulating policies that will promote and preserve diversity while minimizing the hazards of government intrusion into the content of broadcasting” (*id.* at 41a-42a), contrary to this Court’s decision in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (App. A, *infra*, 41a note 4). Judge Bazelon added that “the Commission’s accommodation [in its Policy Statement] of the conflicting policy interests is neither irrational nor wholly contrary to the purposes of the Communications Act,” and noted that the court should not lightly dismiss the FCC’s decision “to cast its lot with the marketplace.” He also stressed “the ‘sensitive First Amendment implications’ of government oversight of format choice” and criticized the majority for “fail[ing] to grapple seriously with the constitutional implications of its decision.” *Id.* at 42a note 4.

Judges Tamm and MacKinnon dissented, concluding that the majority opinion “usurps the proper role of the [Commission] in the formulation of communi-

cations policy" (App. A, *infra*, 46a). The dissenting judges concluded that the majority had

mount[ed] untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's.

Id. at 55a.

The dissent criticized the format doctrine, as articulated by the majority, as a "novel doctrine that calculates the public interest without necessary reference to the aural desires of the greatest number of listeners." *Id.* at 50a. The dissent concluded that the majority opinion had failed to rebut the Commission's showing that it could not do a better job than the marketplace in furthering diversity in entertainment programming:

The majority has not explained how to decide whether a specific format is unique, how to measure the number of listeners who favor a change in format, or how to compare the intensity of preference between listeners who desire retention of a unique format and those who prefer a variation of a pre-existing format. Finally, the majority has failed to identify the principle within the Communications Act that mandates regulation favoring the interest of fewer listeners over the interests of more listeners.

Id. at 53a.

REASONS FOR GRANTING THE PETITION

1. This case presents important questions regarding the proper role of the Federal Communications Commission in overseeing radio broadcasters' selection of entertainment programming. The decision below deals with the recurring situation in which a renewal or transfer applicant intends to abandon an allegedly unique, financially viable entertainment format, despite "public grumbling" from devotees of that format. The court of appeals directs the Commission in such a situation to consider conditioning renewal or transfer on the retention of the particular entertainment format, even though it is no longer wanted by the broadcaster. This is such a departure from the congressionally conceived plan of maximizing listener satisfaction in radio entertainment through "free competition" among broadcasters (*FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940)) as to warrant this Court's review.

The court of appeals has substituted its own untested factual premises and policy conclusions for the Commission's judgment that regulation of entertainment formats is unnecessary, injurious to the best interests of listeners, and not susceptible to principled decision-making.⁶ This arrogation of the agen-

⁶ One commentator's analysis of the court of appeals' earlier format decisions is equally applicable to this decision:

The cases are extraordinary illustrations of a court willing to expand its own function at the expense of the agency's discretion, to make remote inferences of policy from amorphous and general statutory language,

cy's "public interest" policy making function conflicts in principle with this Court's recent decision in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).⁷

2. The decision below holds that the Communications Act itself requires Commission adherence to the court of appeals' "format doctrine."⁸ Yet, the decision is bereft of statutory analysis that would support this conclusion. Instead, the court relies on its earlier "format doctrine" holdings (App. A, *infra*, 4a-8a). But those precedents are likewise lacking in any substantial statutory analysis.

In *Citizens Committee (Atlanta) v. FCC*, 436 F.2d 263, 269 (D.C. Cir. 1970), the first format doctrine

and to go beyond mere oversight of the agency's work product to an extended collaborative dialogue with the Commission over what its substantive policies ought to be.

Polsby, *FCC v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, 1978 Sup. Ct. Rev. 1, 17.

⁷ In departing from the ordinary rule of judicial deference, the court of appeals referred to the fact that the agency did not publish for pre-decisional comment a staff paper compiling certain publicly available data (App. A, *infra*, 15a, 34a-35a). However, neither the Due Process Clause nor the Administrative Procedure Act requires pre-decision disclosure in a rulemaking proceeding of staff memoranda of this kind. See generally *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978).

⁸ The court below has exclusive appellate jurisdiction in broadcast licensing matters (47 U.S.C. 402(b)), thus eliminating the possibility of future conflicts between the circuits, a circumstance which, in other contexts, might justify declining review by this Court at this time.

case, the court of appeals' only attempt to undertake statutory analysis is the bare assertion that "it is surely in the public interest * * * for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." But Sections 309(a) and 310(d) (then (b)) of the Communications Act, 47 U.S.C. 309a and 310(d), which contain the general "public interest, convenience, and necessity" standard to which the court referred, do not on their face or by necessary implication require the Commission to compel retention of "technically and economically feasible" entertainment formats.⁹

In *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974), the court of appeals extracted several sentences from this Court's opinion in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), to buttress the format doctrine previously announced in *Atlanta*. One such passage merely reminded that "[t]he 'public interest' to be served under the Communications Act is * * * the interest of the listening public in 'the larger and more effective use of radio.' § 303(g)." 506 F.2d at 267. But nothing in that sentence or the hortatory lan-

⁹ The court of appeals offered no additional statutory analysis in its subsequent format doctrine cases. See *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973).

guage of Section 303(g) of the Act¹⁰ suggests that "the larger and more effective use of radio" must be achieved through Commission regulation of entertainment formats. Nor is the court of appeals' conclusion supported by the observation in *National Broadcasting Co.* that "[t]he avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." 506 F.2d at 267, quoting 319 U.S. at 217. That general statement does not purport to limit the means the Commission may employ to further the desired statutory objective. And it offers no justification for the court's rejection of the Commission's reasoned view that competition, rather than additional regulation, is best adapted to achieve diversity.

3. The Commission does not, of course, dispute that program diversity is an important "public interest" objective. To the contrary, the Commission's Policy Statement explained that a competitive approach to format changes "is the best available means of producing the diversity to which the public is entitled." 60 F.C.C.2d at 863.¹¹ Prior to reaching that conclu-

¹⁰ 47 U.S.C. 303 provides in pertinent part (emphasis supplied):

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

• • • • •

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.

¹¹ The Commission's analysis heeds this Court's repeated admonition (see, e.g., *CBS v. Democratic National Committee*, 412 U.S. 94 (1973)) that radio broadcasting content is gen-

sion, the Commission received extensive comments from all segments of the industry and public. 60 F.C.C.2d at 886-872. The Commission thoroughly explored all aspects of the issue of statutory interpretation, while fully informing itself of the constitutional dimensions of the issue. 60 F.C.C.2d at 859-861, 865, 866-871; 66 F.C.C.2d at 78-80.

This evaluation led the Commission to conclude that abridgment of licensee discretion to select entertainment formats was not required by the Communications Act and was, in fact, "inconsistent" with the statute's purpose. 60 F.C.C.2d at 865. In particular, the Commission pointed to Section 3(h) of the Act, 47 U.S.C. 153(h), which provides that a broadcaster may not "be deemed a common carrier." See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940); *CBS v. Democratic National Committee*, 412 U.S. 94, 105-109 (1973); see also *FCC v. Midwest Video Corp.*, No. 77-1575 (Apr. 2, 1979), slip op. 11-19. Conditioning the grant of a valuable license renewal on the perpetuation of a particular form of programming, no longer desired by the broadcaster, imposes burdens on the broadcaster that are similar to those of common carriers. 60 F.C.C.2d at 860.¹²

erally to be governed by free competition and journalistic discretion rather than regulatory constraints.

¹² As a practical matter, a broadcaster faced with the choice of continuing an unwanted format or surrendering his license normally will choose to continue the existing program service.

Under familiar principles, the Commission's interpretation of its own statute is entitled to substantial judicial deference. *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 121; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). When First Amendment considerations are relevant in determining the scope of a statute, the agency's views on constitutional implications are also deserving of "great weight."¹³ *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 122. Moreover, as this Court has recently emphasized, the proper accommodation of diversity and other values inherent in the "public interest" standard presents a delicate question requiring agency expertise. Where, as here, that question is addressed by the agency in a "rational" manner, the agency's determination should be affirmed. *FCC v. National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 814-815.¹⁴

¹³ Section 326 of the Communications Act, 47 U.S.C. 326, provides that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." This provision reinforces the view that Congress intended the "public interest" standard to be interpreted with the greatest respect for First Amendment values.

¹⁴ The Commission's Policy Statement did not, of course, conclude that the Commission is without authority to review radio programming under all circumstances. This Court has recognized that there are circumstances in which the Commission must go beyond technical considerations in order to discharge its licensing function. See, e.g., *National Broadcasting Co. v. United States*, *supra*. Moreover, there are situations in which the "public interest" in broadcasting demands that the Commission require the broadcasting of certain

4. The Communications Act of 1934 charges the Commission with regulating broadcasting to serve the "public interest, convenience, and necessity." 47 U.S.C. 301, 303, 309(a), 310(d). This Court has interpreted that mandate as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). In exercising that discretion here, the Commission concluded that leaving the selection of entertainment program formats to the judgment of broadcasters, subject to the economic discipline of market forces, was the best method of achieving the necessary level of program diversity.¹⁵ The contrary decision of the court of appeals not only supplants a reasonable administrative interpretation; it also confronts the agency with intractable administrative problems wholly unintended by Congress.

limited types of programs and forbid the broadcasting of other types. See e.g., *Red Lion Broadcasting Co. v. FCC*, *supra*; *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). However, the Commission's reasoned determination here was that intrusive regulation was not necessary to achieve the statutory objective of program diversity, and that the public interest would better be served by the free functioning of competition than by government fiat.

¹⁵ The decision below implies that the Commission ignored the rights of the listening public in reaching its conclusion (App. A, *infra*, 37a-39a). However, the Commission is of the view that it must take as much interest in the rights of listeners who would be deprived of the benefits of proposed new formats as of those who would lose existing formats. Unlike the court below (*id.* at 37a), the Commission was not

The difficulties of defining entertainment formats and determining whether other stations provide adequate "substitute" formats are substantial. Moreover, determining the actual program preferences of listeners presents formidable difficulties because there is no feasible method to measure the intensity of listener preferences for particular types of programming.¹⁶ In addition, the Commission properly characterized the court of appeals' requirement that it determine whether a format *might* have been financially viable, rather than whether the station in fact *was* financially successful, as an "almost fantastically speculative" task. 60 F.C.C.2d at 863 n.5.

willing to justify governmental intervention on the basis of its own subjective or "common sense" view of how listeners are likely to react to format changes.

¹⁶ Both expert testimony adduced at the Commission hearing and a study prepared by the Commission's staff demonstrated that efforts to maximize diversity in entertainment programming through a regulatory scheme such as the "format doctrine" could produce results contrary to the public interest (60 F.C.C.2d at 864, 872-875). That is true because "[t]here is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format" (*id.* at 864). Moreover, "there exists no acceptable, reliable way of measuring" the intensity of listener preferences for a particular format because consumers are not required to pay to listen to radio (*id.* at 873). Because of the inability of the Commission to obtain this information, it concluded that it would have no rational basis to determine whether the public interest would better be served by continuation of the station's existing format or by an entirely new format (60 F.C.C.2d at 864).

The decision of the court of appeals fails to take account of the practical problems implicit in its ruling. While reaffirming the Commission's obligation to determine the uniqueness of endangered formats, the availability of alternative programming, and the financial viability of particular formats, the court of appeals asserts that the Commission "need not consider the public interest implications of format abandonment" when those questions are not present (App. A, *infra*, 5a). That, of course, ignores the Commission's obligation to render a decision when those questions do arise. Moreover, it is no answer to assert that "no public interest issue arises if there is an adequate substitute for the endangered format within the service area" (App. A, *infra*, 6a). This disclaimer begs the difficult question, inherent in the format doctrine, of determining when an "adequate substitute" may properly be said to exist.

The court's asserted willingness to defer to Commission discretion in adopting procedures to reduce administrative difficulties offers little comfort. It is clear, for example, that the court will continue to demand that the Commission maintain "administrative means * * * [that are] capable of identifying and rectifying those infrequent situations in which market allocation *has* failed and in which the public interest would not be served by granting the application." App. A, *infra*, 31a. The Commission is thus required to continue to make determinations regarding uniqueness, availability of alternative programming, and financial viability, which it has con-

cluded it cannot render in a principled and rational manner.¹⁷

Finally, the court of appeals refused to come to grips with the most fundamental administrative difficulty inherent in the "format doctrine"—what is

¹⁷ The court suggested two ways of minimizing the Commission's problem of format classification. The court first said the Commission "could arrive by rulemaking at a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational." App. A, *infra*, 29a. But it is in those cases "at the margins" where outcome-determinative classifications will be most subject to challenge. Inevitably the Commission will be called upon to justify—and will have great difficulty justifying—strict application of any format classification rule in marginal cases.

The court's alternative suggestion was to "dispens[e] altogether with the need for classifying formats by simply taking the existence of significant and bona fide listener protest as sufficient evidence that the station's endangered programming has certain unique features for which there are no ready substitutes in the service area." App. A, *infra*, 30a note 47. Aside from the obvious difficulty of defining what is a "significant" protest in the particular circumstances, the court's suggestion is of help only in turning back hearing requests; it is of no assistance once the case goes to hearing or decision. At that stage, the Commission must attempt to evaluate the proffered evidence of uniqueness and substitutability. Moreover, the court's vague suggestion that the Commission might "require a relatively high level of public grumbling" (*id.* at 30a) ignores the difficulties the Commission would face in tailoring such a requirement to markets of different sizes and in ensuring that the "grumbling" reflects a decided preference of listeners for existing formats rather than proposed formats.

Significantly, the court had no suggestion for reducing the complexity of the financial viability question or minimizing the likelihood that that question would have to be resolved in a hearing.

the Commission's obligation when it determines, consistent with the court's rulings, that the public interest will not be served by the broadcaster's proposed change of program format? While the court stated that the Commission "has no authority * * * to interfere with licensee programming choices," it failed to explain why denial of an application to renew or transfer a license would not result in the forbidden "interference." If the court's format doctrine has any meaning at all, it must necessarily require that, in some instances, the Commission will "interfere" with the broadcaster's selection because the public interest would better be served by alternative programming.¹⁸

5. The failure of the court of appeals to give adequate consideration to the constitutional implications of its holding is an additional ground for review by this Court. The Commission correctly identified the First Amendment values that are threatened by the unnecessarily intrusive regimen of format regulation. See 57 F.C.C.2d at 585; 60 F.C.C.2d at 865; 66 F.C.C.2d at 82-83. The risk of losing a license or an opportunity to transfer a license due to changes in program format (whether or not a hearing is in fact required) will substantially "chill" a broadcaster's

¹⁸ The court's prior decision in *WEFM* makes this point explicitly (506 F.2d at 268):

We think it axiomatic that preservation of a format [which] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest.

willingness to abandon present formats and deter experimentation in new formats.¹⁹ In addition to these “chilling” effects, the court of appeals’ format doctrine would inevitably place the Commission in the position of deciding, at least in some cases, the relative “public interest” benefits of different types of entertainment programming.

In *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 126-127, this Court held that the Commission could reasonably conclude that the price to be paid in the form of increased government interference with the freedom of broadcasters was too high to justify marginal benefits of broadcast diversity. In this case, similarly, the Commission determined that even if diversity gains could be derived from regulation of program formats, those benefits were far outweighed by the disadvantages of government intervention in programming decisions—matters Congress intended to leave to private discretion. 60 F.C.C.2d at 865.

¹⁹ The court’s suggestion that the Commission might “exempt from the hearing requirement formats adopted experimentally and sought to be abandoned after a very short period of time” (App. A, *infra*, 31a) hardly eliminates the First Amendment problem. It simply adds another layer of government regulation. Apparently, the court would have the Commission determine (presumably in advance) what is a realistic but “very short” experimentation period for particular format types. Implementation of this proposal would be well beyond the ken of the Commission, given wide variations from community to community in entertainment tastes, mix of existing formats, market structure, and competitive responses.

As Judge Bazelon explained, “regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over others” (App. A, *infra*, 42a). So long as the Commission is obligated to determine whether a broadcaster’s proposed abandonment of one type of programming in favor of another “better serves” the public interest, the agency inevitably will face situations in which it must find that new formats selected by broadcasters must be rejected. In those cases the Commission would be required to override the broadcaster’s discretion (and the First Amendment interests of its listeners) by refusing to renew its license or by denying transfer of that license unless the proposed new programming is abandoned.

The court of appeals shrugged off these constitutional difficulties with the statement that it “found no constitutional impediment,” and by denying that its format doctrine requires the Commission “to interfere with licensee programming choices” (App. A, *infra*, 25a, 33a). Yet it is plain that an obligation to pass judgment on the public interest value of new entertainment formats proposed by radio stations to take the place of unique formats previously employed is the clearest consequence of the court’s decision. If, as the Commission found, the statutory goal of program diversity can be achieved without this substantial abridgment of programming discretion, the decision of the court of appeals poses an unnecessary threat to First Amendment freedoms that ought to be avoided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1979

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1692

WNCN LISTENERS GUILD AND CITIZENS
COMMUNICATIONS CENTER, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC.
NATIONAL ASSOCIATION OF BROADCASTERS, INTERVENORS

No. 76-1793

CLASSICAL RADIO FOR CONNECTICUT, INC., AND
COMMITTEE FOR COMMUNITY ACCESS, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF BROADCASTERS
CORNHUSKER TELEVISION CORP., ET AL., INTERVENORS

No. 77-1951

THE OFFICE OF COMMUNICATION OF THE
UNITED CHURCH OF CHRIST, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, RESPONDENTS

METROMEDIA, INC.,
NATIONAL RADIO BROADCASTERS ASSOCIATION,
NATIONAL BROADCASTING COMPANY, INC.,
CBS, INC., INTERVENORS

Petitions for Review of Orders of
the Federal Communications Commission

Argued February 7, 1979

Decided June 29, 1979

Before WRIGHT, *Chief Judge*, and BAZELON, MCGOWAN,
TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB, and
WILKEY, *Circuit Judges*.

Opinion for the court, concurred in by *Chief Judge*
WRIGHT, and *Circuit Judges* LEVENTHAL, ROBINSON,
ROBB, and WILKEY, filed by *Circuit Judge* MCGOWAN.

Concurring opinions filed by *Circuit Judges* BAZELON
and LEVENTHAL.

Dissenting opinion filed by *Circuit Judge* TAMM. *Cir-*
cuit Judge MACKINNON joins in *Circuit Judge* TAMM's
dissenting opinion.

MCGOWAN, *Circuit Judge*: In cases culminating with
Citizens Committee to Save WEFM v. FCC, 506 F.2d
246 (D.C. Cir. 1974) (*en banc*), this court, always in
the context of the Federal Communications Commission's
statutory responsibility to pass upon voluntary assign-
ments of radio licenses, construed that responsibility as
comprehending the issue of whether the proposed aban-
donment of a distinctive programing format was in the
public interest. In particular, we said that, where a
significant sector of the listening community, in opposi-
tion to the assignment, protests the loss of such a format
by substantial factual allegations that it is both unique
and financially viable, the statute requires that the Com-
mission hold a hearing.

Thereafter the Commission, after notice and comment
proceedings, issued a "policy statement" disagreeing with
WEFM, arguing that the public interest in diversity of
entertainment formats is best served by unregulated com-
petition among licensees, and urging this court to repudi-
ate the approach it has taken. *Memorandum Opinion and*
Order, 60 F.C.C. 2d 858 (1976) [*Policy Statement*];
66 F.C.C. 2d 78 (1977) [*Denial of Reconsideration*].
Citizens groups interested in fostering and preserving
distinctive entertainment formats petitioned this court
for review.* We set the case for hearing *en banc* be-

* Petitioners in this consolidated review proceeding are
WNCN Listeners Guild and Citizens Communications Center
(No. 76-1692); Classical Radio for Connecticut, Inc. and
Committee for Community Access (No. 76-1793); and Office
of Communication of the United Church of Christ, Mexican
American Legal Defense and Education Fund, National
Latino Media Coalition, National Council of La Raza, Bilin-
gual Bicultural Coalition on Mass Media, American G.I.
Forum, and Public Communication, Inc. (No. 77-1951).

Amici in support of petitioners are Classical Music Sup-
porters, Inc., Committee for Open Media, Consumer Federa-

cause no panel of the court could overrule our *en banc* holding in *WEFM* as the Commission requested.¹ Unpersuaded that our reading of the Act is wrong, we decline the Commission's invitation to announce our abandonment of it.

I

A.

The basic premise of our format cases² is that the Communications Act's "public interest, convenience, and necessity"³ standard includes a concern for diverse en-

tion of America, Friends of WONO, Inc., and Louisiana Center for the Public Interest.

Intervenors on respondents' behalf are American Broadcasting Companies, Inc., CBS, Inc., Cornhusker Television Corporation, Covenant Broadcasting Corporation, Covenant Broadcasting Corporation of Louisiana, Inc., Covenant Radio of Oklahoma, Inc., Fetzer Broadcasting Company, Fetzer Television Corporation, KOOL Radio-Television, Inc., KTOK Radio, Inc., McClatchy Newspapers, Medallion Broadcasters, Inc., Metromedia, Inc., National Association of Broadcasters, National Broadcasting Company, Inc., National Radio Broadcasters Association, Newhouse Broadcasting Corporation, Palmer Broadcasting Company, Plough Broadcasting Company, Inc., Radiohio, Incorporated, Rusk Corporation, and WBNS-TV, Inc.

¹ See *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 32 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977) (*Policy Statement* constitutes "request to this court to reconsider its position in *WEFM*.")

² *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*); *Citizens to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970). See also *Hartford Communications Comm. v. FCC*, 467 F.2d 408 (D.C. Cir. 1972).

³ Communications Act §§ 309(a); 310(b), 47 U.S.C. §§ 309(a); 310(b).

tainment programing. Congress set aside the radio spectrum as a public resource and acted to secure its benefits, not only to those in the cultural mainstream, but to "all the people"⁴ of our richly pluralistic society. It "is surely in the public interest," therefore, "as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." *Citizens Committee to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263, 269 (D.C. Cir. 1970).

Congress delegated to the Commission the task of ensuring that the license grants are used in the public interest. In particular, the Commission must sometimes consider the loss of diversity (together with other factors bearing on the public interest) when deciding assignment applications involving abandonment of existing formats. It must take a "hard look" at the salient problems, including loss of diversity, when making this public interest determination. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

The Commission need not consider the public interest implications of format abandonment, however, when there are compelling indications that the loss in diversity is not serious or that the assignment is otherwise clearly in the public interest. For example, if notice of the change does not precipitate an outpouring of protest,⁵ the Commission may properly assume that the proposed format is ac-

⁴ *National Broadcasting Co. v. United States* 319 U.S. 190, 216-17 (1943) (emphasis added).

⁵ See *WEFM*, *supra*, 506 F.2d at 254 (over 1,000 protest letters to the Commission); *Progressive Rock*, *supra*, 478 F.2d at 928 (11,000 signatures); *Atlanta*, *supra*, 436 F.2d at 265 (over 2,000 signatures on protest letters and petitions).

ceptable.⁶ Similarly, even if a committed and vocal minority engages in significant public grumbling, no public interest issue is raised if their preferred format is the choice of a population segment too small to be accommodated by the available frequencies.⁷ Finally, no public interest issue arises if there is an adequate substitute for the endangered format within the service area.⁸ In these situations the evidence is strong that the assignment will not result in a troublesome diminution of format diversity. Further, if the format itself is shown to be economically unfeasible in the particular market—i.e., if even an efficiently managed station would have no realistic prospect of economic viability—then abandonment of the existing format does not contravene the public interest and the Commission need not pursue by hearing the alleged loss of diversity.⁹

If the record presents substantial questions of fact material to the public interest, including the public interest in diversity, the Commission must hold an evidentiary hearing.¹⁰ However, no hearing is required

⁶ See *WEFM*, *supra*, 506 F.2d at 262 n.21; *Progressive Rock*, *supra*, 478 F.2d at 934; *Lakewood*, *supra*, 478 F.2d at 924 n.9.

⁷ In *Atlanta*, for example, a public interest issue was raised when 16% of the listeners in an area served by 20 radio channels preferred the "classical" format available in only one of such channels. On the other hand, we noted that a switch to the format preferred by the majority would make perfect sense if there were only one available channel. 436 F.2d at 269.

⁸ *WEFM*, *supra*, 506 F.2d at 262-265; *Progressive Rock*, *supra*, 478 F.2d at 929 n.6, 932; *Lakewood*, *supra*, 478 F.2d 924 n.10; *Atlanta*, *supra*, 436 F.2d at 271-72.

⁹ *WEFM*, *supra*, 506 F.2d at 262; *Progressive Rock*, *supra*, 478 F.2d at 931; see *Atlanta*, *supra*, 436 F.2d at 270.

¹⁰ Under § 309(a) of the Act, 47 U.S.C. § 309(a), the Commission must determine, with respect to a license application,

when the record presents no substantial questions of material fact. If the only issues of substance are the inferences and legal conclusions to be drawn from known facts, the Commission is free to make the public interest determination and decide the application before it.¹¹ Even when the record otherwise presents substantial fact issues, a hearing is unnecessary if undisputed facts

whether the public interest, convenience and necessity would be served thereby and, if it so determines, must grant the application. Assignment or transfer applications are subject to the same standards and treated in the same manner, 47 U.S.C. § 310(d); see *id.* §§ 308, 309(a). Section 309(d)(1), 47 U.S.C. § 309(d)(1), provides that any party in interest may petition the Commission to deny the application, and that such petition "shall contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience and necessity]." Section 309(d)(2), 47 U.S.C. § 309(d)(2), provides:

If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with [the public interest, convenience, and necessity], it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with [the public interest, convenience, and necessity], it shall proceed as provided in subsection (e) of this section.

Subsection (e) governs the procedures for setting the application down for a hearing and notifying interested parties, and, in the case of issues presented by a petition to deny, authorizes the Commission to assign the burden of going forward and the burden of proof.

¹¹ *Progressive Rock*, *supra*, 478 F.2d at 930-931; *Lakewood*, *supra*, 478 F.2d at 924.

establish any one of those situations discussed above in which no public interest issue arises. Thus, a hearing will rarely be needed to determine that (1) there has been no out-pouring of public protest to the format change, (2) the endangered format's devotees are too few to be accommodated by the available frequencies, (3) there is an adequate substitute in the service area,¹² or (4) the format itself is financially *unviable*.¹³

B.

In response to our *WEFM* decision, the Commission on January 19, 1976 proposed to reexamine the format question. *Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C. 2d 580 (1976) [Notice of Inquiry]. It expressed "deep[] concern[]" that *WEFM* threatened "serious adverse consequences for the public interest," *id.* at 582, and doubted that "a system of pervasive governmental regulation," *id.*, could do a better job than concededly imperfect market forces. The "quagmire" of administratively distinguishing among formats militated against regulation, as did the possibility that broadcasters, to avoid being locked in to an unprofitable format, would cease experimenting with unusual programming approaches. *Id.* at 582-84. The "policy," as the Commission chose to characterize it, imposed by this court also raised questions under the First Amendment warranting "prompt and thorough review." *Id.* at 585. The Commission, in short, was "concerned that the course charted by the Court may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to (or more in the public

¹² *Lakewood*, *supra*, 478 F.2d at 924 n.10; compare *Progressive Rock*, *supra*, 478 F.2d at 932.

¹³ *Lakewood*, *supra*, 478 F.2d at 921-22 n.2, 924 n.11.

interest than) that favored by the marketplace." *Id.* at 584.

In light of these misgivings, the Commission proposed to reconsider whether it "should play any role in dictating the selection of entertainment formats." *Id.* It solicited public comments on the statutory and constitutional considerations described above. It also invited "[p]arties who favor some degree of government involvement" to address a number of questions¹⁴ bearing

¹⁴ (a) When should the Commission become involved in format changes—i.e., in all cases or only those where there is a significant public outcry? See *Citizens Committee to Keep Progressive Rock*, *supra* at 934. Also, how do you determine significant public outcry?

(b) Should the Commission attempt to categorize entertainment formats and, if so, on what basis?

(c) Other than a general objection to a proposed change in entertainment format, what burdens should be placed on members of the public to demonstrate that a unique format is being abandoned?

(d) If an applicant proposes to change from an alleged unique format, what showing is necessary to justify the proposed change? Also, if financial hardship is alleged, what showing should be submitted by an applicant justifying the losses?

(e) In cases of an alleged unique format, what consideration should be given to factors such as: (i) the similarity of other formats in the market; (ii) the population and areas served by broadcast facilities; (iii) the audience of the respective stations; (iv) the hours of operation, type of service (e.g., AM, FM, educational), and the like? Further, in hearing cases involving alleged unique formats, what should be the burdens of the respective parties?

(f) If an applicant proposes to change from one unique format to another, should a hearing be held to determine which will better serve the public interest?

[Continued]

on the practical implementation of WEFM.¹⁵

¹⁴ [Continued]

(g) Should the Commission consider a change from an alleged unique format only when the station is being sold, at license renewal time, or at other times?

(h) Is the maximization of program diversity necessarily in the public interest? That is, does the maximization of entertainment formats necessarily result in the maximization of consumer satisfaction?

57 F.C.C. 2d at 584-85.

¹⁵ Chairman Wiley wrote a separate statement emphasizing the subjectivity of classifying formats and criticizing WEFM for erecting barriers to entry to successful entertainment formats. Commissioner Robinson contributed a concurring statement expanding on the *Notice of Inquiry* and criticizing WEFM, in addition, for placing the entire weight of the obligation to promote diversity on the licensee planning to abandon a "unique" format.

Commissioner Hooks, in a separate concurring statement, stressed the difficulties minority audiences experience in receiving their preferred programming. In his view, WEFM did not demand "format allocation on a grand scale and a system of intimate monitoring." *Id.* at 589. Believing that the Commission's energies were better spent "devising tenable standards to apply rather than battling speculative aberrations," he suggested a "common sense" reading:

To determine whether a format is unique in the community, I would use only a threshold test of conspicuous generic equivalence To determine whether there is significant grumbling" about a proposed format change, I would compare the magnitude of the protest to the magnitude of the service area using a zone of reasonableness concept. I would interpret economic feasibility as consistent with a profit comparable to the average station in the market (or like market) since I don't believe the court expects anybody to labor for less than fair recompense.

Id.

Comments were filed, and on July 30, 1976, the Commission repudiated the WEFM decision on four principal grounds. First, WEFM misread the Communications Act because it imposed "common carrier-like" obligations in violation of congressional intent that broadcasters compete freely¹⁶ and not function as common carriers.¹⁷ *Policy Statement, supra*, 60 F.C.C. 2d at 859-61. Second, the administrative record—in particular a Commission staff study appended to the *Policy Statement*—demonstrated that competition was highly effective in producing format diversity. Competition, in the Commission's view, has resulted in an "almost bewildering array" of formats in major markets, *id.* at 863, and has facilitated listener choice among stations broadcasting the same format, *id.* at 863-64; conversely, regulation under WEFM would probably deter innovative programming. *Id.* at 865. Third, administering WEFM would pose vexing administrative problems: formats are difficult to categorize and the costs of a hearing would be enormous, particularly since the doctrine applies logically in license renewals as well as in assignment applications. *Id.* at 861-63, 864-65. Finally, WEFM improperly invaded First Amendment interests by chilling broadcasters' programming choices and by imposing an obligation to continue service. In short, WEFM would impose "comprehensive, discriminating, and continuing state surveillance,"¹⁸ which the Commission believed

¹⁶ The Commission quoted *FTC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940):

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

¹⁷ 60 F.C.C. 2d at 859-60, citing § 3(h) of the Act, 47 U.S.C. § 153(h), set forth at note 36 *infra*.

¹⁸ 60 F.C.C. 2d at 865, citing *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

would be flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximizing the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming.

Id. at 865-66.

The *Policy Statement* concluded with a comment on the "partnership" between the Commission and the Court of Appeals. *Id.* at 865, citing *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). In the Commission's view, "when such 'partners' come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive." 60 F.C.C. 2d at 865. The Commission contended that in the present docket it had engaged in such a reconsideration; by implication, it requested this court also to take a step back and rethink our *WEFM* decision. However, the Commission vowed to implement fully *WEFM*'s specific mandate that a hearing be held in that case. Further, it stayed implementation of its "new policy" until the completion of judicial review thereof. *Id.* at 866.¹⁹

¹⁹ Commissioner Robinson wrote a separate statement endorsing the majority opinion and reiterating his view that *WEFM* imposed unfair burdens on the licensee proposing to abandon a unique format. He also added a word about the proper roles of court and agency:

Just as the Court doubtless does not intend by this or any other expression to suggest that it has the responsibility for original formulation of communications policy or *de novo* review of Commission actions . . . so it should not be understood by our action here that we construe this partnership notion to give us the right to overrule the

The Commission attached two appendices to its *Policy Statement*. Appendix A was a summary of the comments pro and con on the various issues raised by the *Notice of Inquiry*. Appendix B was a staff document, prepared after the close of the comment period, which argued on theoretical and empirical grounds that *WEFM* was not superior to the free market and that competition among licensees had resulted in a high degree of format diversity. Using statistical techniques to test the hypothesis that format type has no effect on audience ratings—i.e., roughly, that the degree of variation in audience share among stations programing the same format was as great as the variation among stations programing different formats—the staff concluded that, although format type did have a statistically significant impact on audience share, the magnitude of that impact was small. In the staff's view, this study demonstrated *WEFM*'s "decisive flaw" in assuming that duplication of stations within a format is wasteful in terms of listener satisfaction. *Id.* at 873.

Court's mandate. While we draw on this partnership concept to support our firm expression of independent views on this matter contrary to those of the Court of Appeals, I trust all will recognize that we do so in the respectful posture of a junior partner who knows how to march once the marching orders have been authoritatively pronounced—one and for all.

60 F.C.C. 2d at 883.

Commissioner Hooks dissented because "the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not." *Id.* at 882. He believed it incumbent on the Commission to make an especially searching examination of license assignment proposals involving loss of unique formats, and reiterated his belief that the Commission could adopt an approach to implementing the *WEFM* decision that minimized its intrusive features.

On August 25, 1977, the Commission refused to reconsider the *Policy Statement*. *Denial of Reconsideration, supra.*²⁰

II

Although the Commission claims to have taken a "step back" and impartially reexamined the issue, its treatment of the format decisions, and of citizens groups seeking to enforce them, has been such as to cast serious doubt on the rationality and impartiality of its action. Two facets of the *Policy Statement* stand out in this connection: the Commission's reliance on a previously undisclosed staff study, and its contention that enforcing *WEFM* would be an "administrative nightmare".

A.

Even a brief perusal of the *Policy Statement* reveals that the staff study, which was issued as Appendix B thereto, had a major influence on the decision. The Commission cited it in the body of the *Policy Statement* as showing "decisively . . . how effective the tool of competition has been in carrying out Congress' plan for entertainment programming";²¹ as supporting the conclusion that "the marketplace is the best way to allocate entertainment formats in radio";²² and as strongly indicating that listeners carefully discriminate among stations programing the same format.²³ In view of the study's importance, we might have expected that, before

²⁰ Commissioner Fogarty, a recent appointee, concurred "to the extent [the *Denial*] respectfully seeks further judicial guidance," 66 F.C.C. 2d at 86, but expressed "basic agreement" with the thrust of *WEFM*. Commissioner Hooks dissented without opinion.

²¹ *Policy Statement, supra*, 60 F.C.C. 2d at 861.

²² *Id.* at 863.

²³ *Id.*

reaching a decision, the Commission would release it for adversarial testing of its data base, methodology, and conclusions. See generally *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251-52 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 392-94 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 631-33 (D.C. Cir. 1973). Yet it appears that, prior to the issuance of the *Policy Statement*, only the Commission itself knew of the study's existence.

The Commission's failure to disclose this important technical document for public comment not only diminishes the assurance that its decision is substantively accurate, but also raises questions of procedural fairness to the parties opposed thereto. Aggravating the procedural aspect in the present case are certain statements made by the Commission in response to inquiries from citizens groups. Several times during the comment period, for example, petitioners requested the Commission to contract for an independent study of format diversity, J.A. at 145, 153; *id.* at 160, 161; *id.* at 237, 238. Petitioners argued that the *Notice of Inquiry* lacked a sufficient data base, that the industry-commissioned studies filed during the comment period were biased, and that petitioners did not have the resources to fund their own studies. The Commission denied these requests on February 19, 1976, and May 24, 1976, J.A. at 164, 169; *id.* at 247, 248. On March 29, 1976—four months before the issuance of the *Policy Statement*—the Commission's Broadcast Bureau responded to a Freedom of Information Act request for "all data, reports and memoranda utilized or proposed to be utilized by the Commission in this proceeding . . .," J.A. at 48, without indicating that it planned to use a staff study in deciding the *Inquiry*. Although perhaps accurate when made, these statements created the somewhat misleading im-

pression, which the Commission could usefully have corrected, that no studies would be undertaken.

The Commission argues that the parties had an adequate opportunity to comment on the study on petition for reconsideration. The heavy burden on any petitioner for reconsideration, however, surely makes the opportunity to comment at this stage a less than adequate substitute for the chance to influence the Commission's initial decision. That the Commission was not open-minded at this stage is evident from the record. It apparently required a Freedom of Information Act request for petitioner Citizens Communications Center to obtain a description of the methodology used in preparing the study. J.A. at 68-87. This description was provided on September 15, 1976, two weeks after the expiration on the time period for reconsideration petitions.

Even if we accepted at face value the Commission's representation that it would have considered a request for reconsideration filed out of time if based on newly-disclosed material, our misgivings would not be fully assuaged. The Commission's Freedom of Information Act response contained computer worksheets which were obscure if not incomprehensible to readers lacking a key to the meaning of the figures. Citizens Communications Center requested such a key in a letter to the Commission dated March 22, 1977. J.A. at 100-100A. The Commission's response, which contained such a key, see J.A. at 573-75, was apparently sent only to the Citizens Communications Center and not to other petitioners as might have been expected had the Commission acted out of a good faith desire to obtain comments on the study. Some petitioners claim that the first they knew of this key was when the Commission designated it for inclusion in the Joint Appendix filed in this court. In short, it is open to serious question whether even after issuance of the *Policy Statement* the petitioners were given information

about the study's design and data base sufficient to allow meaningful comment thereon, and whether, if such comment had been feasible, the Commission would have received it with an open mind.²⁴

B.

One of the Commission's principal grounds for repudiating the format decisions was the contention that implementing them would be an "administrative nightmare", imposing "enormous costs on the participants and the Commission alike."²⁵ The hearing on remand from the *WEFM* decision, which was said to be "fairly typical" of format abandonment proceedings, involved the following:

[A]n administrative law judge held two prehearing conferences in Washington, D.C.; his preparation time was an additional eight hours. In addition the Broadcast Bureau trial staff spent above two hundred man-hours of preparation time. Subsequently, hearings were held on nine separate dates in Washington, D.C., and on nine different dates in Chicago, from which a transcript of 3120 pages was compiled. Following the hearings, the Broadcast Bureau spent two hundred and forty hours preparing proposed findings of fact and the administrative law judge will have spent approximately two hundred and eighty hours preparing his initial decision.²⁶

²⁴ Petitioners urge this defect as an independent ground for overturning the Commission. We agree that the study does raise serious questions about the overall rationality and fairness of the Commission's decision. However, because certain broader defects, of which the study is symptomatic, are fatal to the Commission's action, we need not decide whether the failure to obtain public comment on the study is itself of sufficient gravity to warrant rejection of the *Policy Statement*.

²⁵ 60 F.C.C. 2d at 865, 864.

²⁶ *Id.* at 864-65.

The Commission was particularly concerned with the burden of such hearings because, in its view, they would also be required when a licensee that had changed its format mid-term (without transferring the license) applied to the Commission for license renewal.²⁷

While we do not wish to minimize the burdens of a format abandonment hearing, the truth is that in the sunlight of the facts the Commission's "administrative nightmare" turns out to be little more than a dream. The Commission professes that it has sought in good faith to administer format changes ever since the *Atlanta* decision in 1970. An examination of the actual burdens imposed on the Commission by the cases that have reached this court during that period—all involving license assignment applications—is highly instructive.

In *Atlanta*, this court reversed the Commission's approval without a hearing of a license assignment involving a change from classical music to "a blend of popular favorites, Broadway hits, musical standards, and light classics," 436 F.2d at 265, and remanded the case for an evidentiary hearing on the alleged unprofitability of the existing operation, the accuracy with which views of prominent citizens were represented, and the degree to which listeners were provided with classical music from other broadcast sources. However, no hearing was held on remand because the parties settled the matter among themselves. In *Progressive Rock* we remanded a case involving a proposed shift from "progressive rock" to "middle of the road" for a hearing on the issues of financial viability and alternative sources of the format. Again the parties apparently settled the dispute and no hearing was held. In *Lakewood*, a case involving a proposed switch from "all-news" to "country and western," we found no substantial dispute over the issues of financial viability and alternative sources of the format, and

²⁷ *Id.* at 861.

hence upheld the Commission's approval of the application without a hearing.

Finally, in *WEFM*, we remanded a case involving a switch from classical to rock music for a hearing on the questions of financial viability, accuracy of community leader surveys, and availability of alternative sources. A hearing was held, and the Administrative Law Judge issued an initial decision proposing to grant the application. *Zenith Radio Corp.*, F.C.C. 76D-47 (1976), 76D-46 (1977). Subsequently, however, the parties agreed to a settlement in which the petitioner to deny agreed to withdraw its objection in exchange for certain actions designed to strengthen alternative sources of classical music in the listening area. The Commission approved the settlement. *Zenith Radio Corp.*, F.C.C. 78-102, 42 Pike & Fischer Radio Reg. 2d 472 (1978).

In light of this history, the Commission's fears appear somewhat less than realistic. In nearly ten years, a mere handful of format change cases have reached this court. Of these, one—*Lakewood*—resulted in the Commission's being affirmed on grounds indicating that in many cases no hearing would be required. Two—*Atlanta* and *Progressive Rock*—were remanded but were settled before a hearing could be held. In the entire history of the format cases, only one case—*WEFM*—has resulted in a hearing; and even this was settled prior to administrative appellate procedures. The hearing that did occur, although by no means inconsequential in scope, was nevertheless less extensive than the typical comparative renewal proceeding.²⁸ Nor does the burden promise to be significantly greater in the future. At oral argument, the Commission's counsel, upon inquiry from the bench, estimated that "perhaps half a dozen" petitions to deny based on

²⁸ See Note, Judicial Review of FCC Program Diversity Regulation, 75 COLUM. L. REV. 401, 406 n.33 (1975).

format changes were then pending. If past experience is a guide, few, if any, of these will eventuate in a hearing.

The Commission also argues that the administrative burden is excessive because format hearings will be required in the renewal as well as the transfer context. We do agree that the format cases logically apply to renewal applications.²⁹ But we do not believe that renewals will open the flood gates to the administrative hearing room, because the safeguards against excessive numbers of hearings are as present in the renewal context as in the assignment context. No hearing will be required on a renewal application if the abandoned format is financially unviable, if it is not unique in the listening area, or if there has been an insufficient outpouring of public protest against the change.

Apparently recognizing its untenability, the Commission's counsel, at oral argument before us, conceded that the "administrative nightmare" characterization was an "exaggeration" and personally assured the court that the argument was not "very significant at all" to the Commission's decision. Yet this concession does not retroactively make rational the Commission's ill-advised reliance on the issue. And we cannot but view with considerable suspicion an administrative agency's decision that lays such stress—to the point of almost frenzied rhetorical excess—on an argument which, in light of the actual facts, appears so lacking in merit.³⁰

²⁹ By the same logic, however, *WEFM* does not apply to format changes made mid-term by the licensee, except insofar as such changes are placed in issue at renewal time.

³⁰ The "administrative nightmare" argument calls to mind an earlier controversy in which similar contentions were made. See *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969); text at pp. 48-49 *infra*.

III

The staff study and administrative nightmare issues are merely the most striking examples of certain more pervasive problems. Throughout the format controversy, the Commission has displayed a deep-seated aversion to the decisions of this court (and to the advocates of those decisions) while at the same time misinterpreting and exaggerating their meaning. Perhaps as a result of these interrelated defects, the Commission failed to take affirmative steps to minimize what it perceived as the intrusive features of the format decisions while preserving their essence.

A.

It has been evident from the start that the Commission's response to the format decisions would be something less than enthusiastic cooperation. Professing time and again that entertainment programming is very broadly, if not wholly, committed to licensee discretion,³¹ the Com-

³¹ In the administrative decisions and briefing to this court in the *Atlanta* case, the Commission argued repeatedly that if the proposed format serves a significant audience segment then a determination to use that format is a judgment for the broadcaster to make, not the Commission. *Atlanta, supra*, 436 F.2d at 269; *Glenkaren Assocs., Inc.*, 14 Pike & Fischer Radio Reg. 2d 104, 105-106 (1968) (initial decision); 19 F.C.C. 2d 13, 15 (1969) (denial of reconsideration). We rejected this argument in *Atlanta*, 436 F.2d at 272.

Our *Atlanta* decision, however, did not deter the Commission from pressing its belief in licensee discretion in later cases. See *Charles A. Haskell*, 36 F.C.C. 2d 78, 87 (1972), *aff'd on other grounds, Lakewood, supra* (public interest "best served by not hampering a licensee's flexibility in choosing or changing formats"); *Twin States Broadcasting, Inc.*, 35 F.C.C. 2d 969, 971 (1972), *rev'd, Progressive Rock, supra* (format choice "primarily in the discretion of the licensee and unless it is shown or appears to the Commission that the format choice is not reasonably attuned to the tastes and general interests of the community of license, we shall not

mission has never initiated a hearing in a format change case and has repeatedly urged this court to reverse or drastically curtail the decisions.³² And it instituted the present proceeding in the nature of rulemaking with the apparent purpose of overruling the *WEFM* case. Whatever its power generally to proceed by rulemaking rather than adjudication, we think it a somewhat different matter when the seeming purpose of the rulemaking is the circumvention of a recent court decision reached in an adjudicatory context.

These misgivings are not allayed by the record of the present proceeding. It hardly requires a literary critic to discern that the *Notice of Inquiry's* "questions" about *WEFM* were for the most part rhetorical. Those favor-

question the licensee's judgment in these matters"); *id.* at 974 (Commissioner Johnson, dissenting) (majority decision is "clear and direct violation of the law as interpreted by the Court of Appeals"). Similarly, in *Zenith Radio Corp.*, 40 F.C.C. 2d 223, 230 (1973) (Additional Views of Chairman Burch), *rev'd*, *WEFM*, *supra*, six of the seven Commissioners joined in the view that a station's entertainment program format "is a matter best left to the discretion of the licensee or applicants." Although the Commissioners did promise to take an "extra hard look" at proposals depriving communities of unique formats, 40 F.C.C. 2d at 231, this was repudiated in the *Policy Statement* here under review, 60 F.C.C. 2d at 866 n.8.

³² See, e.g., *WEFM*, *supra*, 506 F.2d at 260 n.17; *Progressive Rock*, *supra*, 478 F.2d at 930 ("[i]t is our distinct impression . . . based on the briefs and oral arguments . . . that the Commission desires as limiting an interpretation as is possible. We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of [Atlanta] to cases involving Atlanta classical music stations"); *Zenith Radio Corp.*, 38 F.C.C. 2d 838, 845-46 (1972), *reconsideration denied*, 40 F.C.C. 2d 223 (1973), *rev'd* *WEFM*, *supra* ("extension of [the Atlanta] holding beyond the limited confines of the facts and circumstances therein would be most unwise").

ing *WEFM* could not have been heartened to read of the Commission's "deep[] concern[]" that *WEFM* "may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to that favored by the marketplace," and that the decision might cause "serious adverse consequences for the public interest." 57 F.C.C. 2d at 582, 584, 582. The indications in the *Notice of Inquiry* that the Commission would not give pro-*WEFM* comments due consideration were borne out by later events. Its *Policy Statement*, as we have noted at length, relied heavily on a staff study which had not been placed in the record for public comment. Moreover, the Commission ignored completely comments, which it had solicited, *see* note 14 *supra*, concerning how *WEFM* could effectively be administered.³³

B.

Closely related to the Commission's innate aversion to our format decisions is its sometimes drastic misreading of those cases. It analyzed the problem in stark terms: formats are to be chosen *either* by market forces or by "the alternative to the imperfect system of free competition . . . a system of broadcast programming by government decree." *Denial of Reconsideration*, *supra*, 66 F.C.C. 2d at 81. *WEFM*, in the Commission's view, is the antithesis of the free market: it mandates a "system of pervasive governmental regulation," *Notice of Inquiry*, *supra*, 57 F.C.C. 2d at 582, requiring "comprehensive, discriminating, and continuing state surveillance." *Policy Statement*, *supra*, 60 F.C.C. 2d at 865, *citing* *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

Having framed its analysis in Manichaeian terms, it is not surprising that the Commission found numerous

³³ See J.A. at 206-225 (Comments of WNCN Listeners Guild); *see also id.* at 338-341 (Petition for Reconsideration of Office of Communication of United Church of Christ *et al.*).

flaws in our format cases. There would no doubt be severe statutory and constitutional difficulties with any system that required intrusive governmental surveillance, dictated programing choices, forced broad access obligations, or imposed an obligation to continue in service under any and all circumstances. Moreover, any system of pervasive regulation of the type envisaged by the Commission would indeed be an "administrative nightmare," a "quagmire" that the agency would be well-advised to avoid.

The truth is that the actual features of *WEFM* are scarcely visible in this highly-colored portrait. As we have emphasized before and repeat today, *WEFM* was *not* intended as an alternative to format allocation by market forces. We fully recognized that market forces do generally provide diversification of formats. The licensee's discretion over programing matters is therefore very broad while the Commission's role is correspondingly narrow³⁴ However, we also recognized—as does the Commission—that the radio market is an imperfect reflection of listener preferences. Because broadcasters earn their revenues from advertising, they tend to serve young adults with large discretionary incomes in preference to demographically less desirable groups like children, the elderly, or the poor. *See WEFM, supra*, 506 F.2d at 268.

Further, as is clear from our earlier cases, the Commission's obligation to consider format issues arises only when there is strong *prima facie* evidence that the market has in fact broken down. No public interest issue is raised if (1) there is an adequate substitute in the

³⁴ *See Progressive Rock, supra*, 478 F.2d at 929 (most format changes do not substantially diminish diversity and thus may appropriately be left "to the give and take of each market environment and the business judgment of the licensee"); *Atlanta, supra*, 436 F.2d at 272 (licensee has "considerable latitude in the matter of programming").

service area for the format being abandoned, (2) there is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable. *See* text accompanying notes 5-9 *supra*. One or another of these factors is surely present in most format changes. And generally the existence *vel non* of these factors can be determined without the need for a hearing. The small remainder of cases are simply those in which the evidence strongly indicates that market mechanisms have not satisfied the Communications Act's mandate that radio serve the needs of all the people.

As we have observed in Part II *supra*, the Commission's administrative nightmare argument is seen to have little merit when it is remembered that only one of the handful of format cases reaching this court has resulted in a hearing. Also unpersuasive, in this regard, is the Commission's contention that *WEFM* mandates an unconstitutional, or at least statutorily proscribed, intrusion on licensee programing discretion. The Commission laid particular stress on the argument that licensees will be deterred from experimenting with unusual formats out of a fear of being locked in. But it has provided little or no evidence that *WEFM* has in fact deterred licensees' format choices; quite to the contrary, the Commission's staff study concluded that under the *WEFM* regime licensees have been aggressive in developing diverse entertainment formats.

Finally, we must emphasize the narrowness of the Commission's remedial powers. It merely has the power to take a station's format into consideration in deciding whether to grant certain applications. It has no authority under *WEFM* to interfere with licensee programing choices: it cannot restrain the broadcasting of any program, dictate adoption of a new format, force retention

of an existing format, or command provision of access to non-licensees. To say that it is empowered to impose censorship³⁵ or common carrier³⁶ obligations is to stretch *WEFM* virtually beyond recognition.³⁷

³⁵ See Communications Act § 326, 47 U.S.C. § 326:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

This prohibition "has never been construed to deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." *FCC v. Pacifica Foundation*, 98 S.Ct. 3026, 3033 (1978).

³⁶ See Communications Act § 3(h), 47 U.S.C. § 153(h), which provides in pertinent part that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

The central distinguishing characteristic of broadcast common carriers is that they must provide non-discriminatory public access to their facilities. *FCC v. Midwest Video Corp.*, 47 U.S.L.W. 4335, 4338-4340 (Apr. 3, 1979); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 105-109 (1973). Nothing remotely resembling public access obligations is involved in the present case. Nor do we find persuasive the other asserted resemblances between *WEFM* and common carrier regulation: it neither obligates broadcasters to "continue in service," regulates the rates charged to advertisers, or prohibits unnecessary duplication of facilities.

³⁷ It is also argued by commercial broadcasters that *WEFM* contravenes § 310(d) of the Act, 47 U.S.C. § 310(d), which provides, in pertinent part, that in acting on transfer or assignment applications "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee." *WEFM* is said to violate this provision by

C.

The Commission would likely have been less concerned had it read our format cases more accurately; conversely, it would probably have better interpreted those cases had it viewed them more sympathetically. The flaws in its approach are intimately connected. They intersect in the Commission's failure to implement the cases so as to minimize their drawbacks while preserving their essence. Had it attempted to develop administrative standards instead of simply abdicating, it might well have discovered that many perceived "flaws" could be lessened or eliminated altogether.

The impetus for developing such standards must come, in the first instance, from the Commission. Only it, and not this court, has the expertise to formulate rules well-tailored to the intricacies of radio broadcasting, and the flexibility to adjust those rules to changing conditions. Only it has the opportunity to develop standards of general applicability outside an *ad hoc* adjudicatory context. And only it has the power to determine how to perform its regulatory function within the substantive and procedural bounds of applicable law.

requiring the Commission to compare the qualifications and operations of the assignor with those of the assignee.

This argument was not, however, relied on by the Commission in either of its actions reviewed herein. In any event, § 310(d) by its literal terms would not appear to forbid assignor-assignee comparisons because the license is not "transfer[red], assign[ed], or dispos[ed] of" when it is retained by the existing licensee. This is the position taken by the Commission itself. *Wichita-Hutchinson Co.*, 20 F.C.C. 2d 584, 586 (1969) ("[t]he comparison prohibited by [§ 310(d)] is not between the transferor and the proposed transferee but between the proposed transferee and some third person other than the transferee proposed in the application.")

The Commission has not suffered from the want of suggestions along these lines. Scholars have noted that it could develop acceptable guidelines.³⁸ This court has emphasized the Commission's discretion to develop administrative standards,³⁹ and stressed that judicial review thereof will be limited and deferential.⁴⁰ The Commission itself has recognized the need for standard-setting. Commissioner Hooks, concurring in the *Notice of Inquiry*, suggested standards for the sympathetic implementation of *WEFM*; ⁴¹ and the Commission majority, in the same document, requested comments on administering the decision.⁴² It is regrettable, from the present perspective, that rather than pursuing this approach the Commission chose simply to throw up its hands. While we cannot, of course, dictate what, if any, standards the Commission should adopt, the following suggests ways in which development of appropriate guidelines could satisfy many of its objectives.

³⁸ See D. Ginsburg, *Regulation of Broadcasting* 316 (1979); Note, *supra* note 28, at 436-37.

³⁹ *WEFM*, *supra*, 516 F.2d at 268 n.35; *id.* at 269 n.4 (Bazelon, C.J., concurring in the result); *Lakewood*, *supra*, 478 F.2d at 925 n.14 ("we have never attempted to set out specific guidelines for achieving the market-place ideal. The first, tentative steps into this complex area of regulation must be taken by the Commission"). *Cf.* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005 (D.C. Cir. 1966) (suggesting that Commission can avoid administrative burdens of public intervention by formulating appropriate regulations by rulemaking).

⁴⁰ *Progressive Rock*, *supra*, 478 F.2d at 934; *Lakewood*, *supra*, 478 F.2d at 922. *Cf.* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1005-06 (D.C. Cir. 1966) (broad discretion to formulate rules governing public intervention).

⁴¹ See note 15 *supra*.

⁴² See note 14 *supra*.

One difficulty noted by the Commission and intervening commercial broadcasters is the alleged impossibility of classifying radio formats. They point to our statement that "we know [a format] when [we hear] it," ⁴³ as being overly subjective, and to some of the distinctions we have drawn between formats as being nice to the point of administrative infeasibility.⁴⁴ Yet these were the judgments of a court forced to decide the case before it by reference to the language of the Communications Act and the Congressional purpose informing it. The Commission, with its greater expertise and broad overview of the subject matter, could arrive by rulemaking at a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational.⁴⁵ The Commission "retains a discretion commensurate with its expertise to make reasonable categorical determinations," *WEFM*, *supra*, 506 F.2d at 265. Had it developed a rational classification schema in the first instance, this court would surely have given it great credence even if the results reached thereunder differed from those obtained by application of our own unguided analysis.⁴⁶

⁴³ *Atlanta*, *supra*, 436 F.2d at 265 n.1, quoting *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁴⁴ See *WEFM*, *supra*, 506 F.2d at 265 n.28, 264-65 (suggesting distinctions between twentieth century and other classical music and between "fine arts" and "classical"); *Progressive Rock*, *supra*, 478 F.2d at 932 ("progressive rock" distinguished from "top forty").

⁴⁵ *Cf.* *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1053-1060 (D.C. Cir. 1978) (upholding EPA's classification of paper mills into sixteen categories for purpose of setting effluent limitations).

⁴⁶ *Cf.* *National Ass'n of Indep. Television Producers and Distribs. v. FCC*, 516 F.2d 526 (2d Cir. 1975) (upholding Commission's classification of television programs into "public affairs", "documentary" and "children's" as part of prime time access rule).

Indeed, the Commission used a format classification in its staff study to demonstrate the existence of broad diversity in major radio markets. There is a marked inconsistency in its endorsing the validity of a study largely premised on classifications it claims are impossible to make. In any case, the schema used in the staff study follows accepted industry usage and would appear facially rational. It is likely that the perceived administrative difficulties would be greatly reduced if the Commission were to adopt a similar approach.⁴⁷

With regard to WEFM's perceived intrusiveness, the Commission could set rigorous standards as to when petitioners to deny have established a prima facie case. It could, for example, require a relatively high level of public grumbling, could classify formats into broader rather than narrower categories, and could place the burden of demonstrating "uniqueness" on the petition-

⁴⁷ Furthermore, the Commission is not precluded from experimenting with more innovative approaches. It might consider, for example, dispensing altogether with the need for classifying formats by simply taking the existence of significant and bona fide listener protest as sufficient evidence that the station's endangered programming has certain unique features for which there are no ready substitutes in the service area. In other words, the Commission could dispense with the requirement that the endangered format be demonstrably "unique". This approach would obviate the need for "subjective" distinctions among formats and would respond, also, to the objection that listeners perceive important differences among stations programming the "same" format. And by concentrating on the existence of listener unrest, this approach would focus attention on the essentials of the format doctrine, namely, that when a significant sector of the populace is aggrieved by a planned programming change, this fact raises a legitimate question as to whether the proposed change is in the public interest.

ers.⁴⁸ To deal with the "lock in" problem it could exempt from the hearing requirement formats adopted experimentally and sought to be abandoned after a very short period of time.

In the analogous context of the fairness doctrine, the Commission has adopted stringent prima facie case requirements that weed out, at the outset, the great majority of complaints. We recently upheld, *en banc*, the Commission's dismissal of a fairness doctrine complaint based on those rigorous standards. *American Security Council Education Foundation v. FCC*, No. 77-1443 (D.C. Cir. 1979). We noted that the prima facie evidence requirement served to protect delicate First Amendment values by ensuring that robust, wide-open debate would not be deterred. Like the fairness doctrine, the format cases involve the Commission in an area charged with sensitive First Amendment implications. The Commission could surely use a similar technique in the format context for accommodating First Amendment values to the fact that broadcasters, under the scheme of the Communications Act, are public trustees obligated to serve the public interest.⁴⁹

None of this is to imply, however, that the Commission is free to "administer" the format cases as a dead letter.⁵⁰ Whatever administrative means the Commission adopts must be capable of identifying and rectifying those infrequent situations in which market allocation *has* failed and in which the public interest would not be

⁴⁸ Cf. J.A. at 220 (comments of WNCN Listeners Guild) (suggesting that petitioning groups should have the burden of making out a prima facie case of uniqueness, although licensee should have burden of proof on the issue).

⁴⁹ See D. Ginsburg, *supra* note 38, at 316.

⁵⁰ Cf. *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969) (right of public to intervene in Commission proceedings cannot be vitiated by Commission's hostile attitude towards intervenors).

served by granting the assignment application. That is the basic message of our format change cases as to what Congress has willed in these situations, and it is one we reaffirm today.

IV

A.

Because the Commission devoted considerable energy to justifying its view of the proper relationship between court and agency, a few words on the subject are in order here. The Commission repeatedly referred to *WEFM* as representing the "policy" of the Court of Appeals, and contrasted it unfavorably with the "policy" of the Commission. It called upon this court, as its so-called "partner" in the regulatory process, to step back and recognize that its "policy" is superior to our own.

We should have thought that *WEFM* represents, not a policy, but rather the law of the land as enacted by Congress and interpreted by the Court of Appeals, and as it is to be administered by the Commission. This court has neither the expertise nor the constitutional authority to make "policy" as that word is commonly understood. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943); *Action for Children's Television v. FCC*, 564 F.2d 458, 481-82 (D.C. Cir. 1977); *WEFM*, *supra*, 506 F.2d at 267-68. That role is reserved to the Congress, and, within the bounds of delegated authority, to the Commission. But in matters of interpreting the "law" the final say is constitutionally committed to the judiciary. See *International Brotherhood of Teamsters v. Daniel*, 99 S.Ct. 790, 800 & n.20 (1979); *SEC v. Sloan*, 436 U.S. 103, 118-19 (1978). Although the distinction between law and policy is never clearcut, it is nonetheless a touchstone of the proper relation between court and agency that we ignore at our peril.

WEFM was an interpretation of a statute applicable to an adjudicatory proceeding and, to this extent, was a decision in which the judicial word is final. That decision was based on an interpretation of the Communications Act. Moreover, although we did not explicitly address the constitutional implications of our decision, the constitutional issue was commented upon extensively by Chief Judge Bazelon in his opinion concurring in the result. Suffice it to say that we found no constitutional impediment to the decision as we understood it. As to these constitutional and statutory issues, it was the Commission's obligation to accept and carry out in good faith its legal duties as interpreted by this court.⁵¹

⁵¹ The Commission's reliance on cases beginning with *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), is misplaced. In *Banzhaf* we affirmed the Commission's determination that cigarette commercials raised controversial issues of public importance and thus gave rise to fairness doctrine obligations for broadcasters who ran them. In subsequent cases this court followed the *Banzhaf* holding with respect to other types of product advertising. *Retail Store Employees Union v. FCC*, 436 F.2d 248 (D.C. Cir. 1970); *Friends of the Earth v. FCC*, 449 F.2d 1164 (D.C. Cir. 1971). The Commission then instituted a general reexamination of the fairness doctrine and concluded that it would no longer apply it to product advertising. Fairness Report, 48 F.C.C. 2d 1, 24 (1970). We affirmed the change of policy. *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 98 S.Ct. 2820 (1978). The Commission argues that we should also permit it to change its mind in the present case and cease enforcing the format decisions.

There is, however, an important difference between when (1) we uphold an agency's interpretation of its governing statute and then review its contrary interpretation; and (2) we reject an agency's interpretation of its governing statute and then review its reaffirmation of its original interpretation. Because of the deference owed the Commission's construction of the Communications Act, *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 121-22 (1973); *Red*

B.

Our legal judgments in the earlier cases, however, were grounded in certain factual premises, namely, that there is, in the traditional sense, no free market in radio broadcasting and that in certain circumstances, when there are persuasive indications that market allocation has broken down, the Commission had been given a useful role by Congress to play in ensuring that the benefits of radio accrue to all the people, not simply those favored by advertisers. The Commission, in its staff study appended to the *Policy Statement*, challenged those empirical assumptions. To the extent that the Commission was not questioning this court's legal judgment, but was attempting to demonstrate that faulty factual premises underlay that judgment, we agree that it was within its competence as an agency better equipped to develop legislative-type facts than is this court.

As we have noted, however, the Commission's use of the staff study was infected with the serious flaw that it

Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969), there is a fairly wide range of interpretations we would uphold on judicial review. In the product commercial cases, both the Commission's positions fell within this range and we were therefore able to uphold both. In the format cases, by contrast, we found from the start that the Commission's interpretation of the Act could not be sustained even when all due deference was given that construction. There is no reason for us to pay any greater deference to the Commission when it makes the same arguments in a subsequent proceeding.

Perhaps recognizing the force of this objection, the Commission attempts to place itself in the first category described above rather than the second: it implies that it originally agreed with the holdings of the format cases and only later determined to change its mind. This argument, however, is belied by the Commission's history of at least passive resistance to the format decisions in the name of licensee freedom. See notes 31-32 and accompanying text *supra*.

never even divulged the existence of the study, much less gave the participants the opportunity to comment thereon, before issuing its *Policy Statement*. This procedural unfairness, coupled with the substantive uncertainty flowing from the lack of adequate adversarial testing during the comment period, is enough to make us view skeptically the Commission's use of the study. But even if we were to accept the study on its own terms, we would not be persuaded.

The study consisted of two parts. In the first, the Commission staff compiled a chart showing which of 18 format types were available in the 25 largest radio markets. From this, the Commission argued that an adequate degree of diversity was currently being achieved by market forces. Second, the staff performed a statistical analysis of the relationship between the format type programmed by a station and its audience share as a rough measure of the degree to which stations programming the "same" format are considered by consumers to be close substitutes for one another. The staff found that the variation of audience shares within a given format was nearly as great as the variation among formats, and concluded that stations programming the same format were not necessarily close substitutes for one another. From this the Commission argued that it was not true, as we had supposed in *WEFM*, that abandonment of a unique format in favor of a format already present in the service area strongly indicated a loss in overall diversity.

The first part of the study, in our view, is completely consistent with *WEFM*. That case recognized that market allocation is generally an adequate guarantor of format diversity; it requires the Commission to step in only when there are persuasive indications that market allocation has failed in a particular case. *WEFM*, we repeat, was aimed not at the probable majority of cases in which the market operates adequately, but at those perhaps

infrequent cases in which it has not done the job. The study does not show that the market functions adequately in every instance.⁵² Indeed, the Commission admits that market allocation is an imperfect reflection of audience preferences.

The second part of the staff study challenged the proposition that the Commission can—and must if it is to be faithful to the Act it administers—sometimes do a better job than the imperfect market. The Commission, as we have noted, viewed *WEFM* as mandating a system of pervasive governmental format allocation antithetical to the free market. If this were the meaning of *WEFM*, we would certainly agree that it could not improve on market allocation. But when it is recognized that *WEFM* contemplates governmental action as a supplement, not a substitute, for the market, and when attention is focused on cases of *prima facie* market breakdown, as in the

⁵² It could be argued, in fact, that by examining only the nation's 25 largest radio markets (which presumably display the greatest degree of diversity) the staff presented a distorted picture of the extent of diversity in the country as a whole. We might also note that even in these major markets important formats are shown as unavailable in the listening area. For example, apparently no classical music service is provided in 7 of the 25 markets. See 60 F.C.C. 2d at 875-79. Conversely, the study shows a high degree of format duplication in the markets studied.

It is a useful corrective to focus, not on the broad range of cases in which the market functions accurately, but on those infrequent cases in which it appears that it has failed to promote diversity and that the Commission could remedy the defect. One need only think of the *Atlanta* case. Although 16% of the listeners preferred classical music, what was allegedly the only classical format was being abandoned in favor of music which was already programed by several of the 20 stations in the service area. In such a situation, it is evident that market forces may not be serving the public interest.

Atlanta case, it seems far more likely that the Commission could usefully play a limited corrective role.

Nor are we convinced by the study's statistical analysis. It is not surprising that one station, by dint of stronger signal, more pleasing announcers, better tempo, superior technical quality or other factors, should gain a much greater market share than another station programing the same format in the service area. What would be surprising, however, is if listeners, deprived of their favorite station, were indifferent as to whether they switched to another station programing the same format or to a different format altogether. The common sense of it is that most lovers of disco will switch to another disco station in preference to classical, all-news, country and western or the like. When a unique format is abandoned, those loyal to that format have no adequate substitute in the service area; when a non-unique format is eliminated, its listeners will generally have an adequate substitute in other stations programing the same format.⁵³ For this reason abandonment of a unique entertainment format raises the special public interest issue treated by our format cases.

Once again the court confronts a problem deriving, in the last analysis, from the common and undivided ownership of the airwaves by all of the people. In *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) and *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969), this court, in two vigorous opinions by Judge (now Chief Justice) Burger, dealt with a Commission reading of the Act that denied standing to oppose license

⁵³ We have also suggested, in note 47 *supra*, that the Commission could experiment with regulatory approaches responsive to the argument that listeners perceive important differences among stations programing the same format.

renewal to all except competing licensees claiming either electrical or economic interference. The first such opinion, at the instance of members of the listening public who wished to be heard on the asserted inadequacies of the licensee's programing, demolished that incredibly restrictive interpretation of the Act's "public interest, convenience, and necessity" standard. The second opinion overturned a rejection of the petition to deny after a hearing and decision on remand which it characterized as positively hostile to the complainants.

In *United Church of Christ*, as here, the Commission asserted all manner of difficulties with the interpretation of the statute pressed upon it by the protestants, including notably severe administrative burdens hampering the discharge of its regulatory responsibilities, if objections to format abandonment were required to be entertained and, where substantial, explored in evidentiary hearings. The Commission's *Policy Statement* in issue here is strongly reminiscent of the attitude displayed by it in *United Church of Christ*. The Commission, despite its parade of horrors in that case, has obviously survived.

In *WEFM* the court was at considerable pains to make clear that it was speaking solely in the context of the current regulatory scheme laid down by Congress. The result reached, we said,⁵⁴

cannot be otherwise when it is remembered that the radio channels are priceless properties in limited supply, owned by all of the people but for the use of which the licensees pay nothing. If the marketplace alone is to determine programming format, then different tastes among the totality of the owners may go ungratified. Congress, having made the essential decision to license at no charge for private operation as distinct from putting the channels up

⁵⁴ *WEFM*, *supra*, 506 F.2d at 268 n.34.

for bids, can hardly be thought to have had so limited a concept of the aims of regulation. In any event, the language of the Act, by its terms and as read by the Supreme Court, is to the contrary.

There is much talk at the moment of deregulation in the communications field, particularly with respect to radio. Bills of varying sweep to this end are pending in the Congress,⁵⁵ and the enactment of at least one of them in its present form would appear largely to eliminate for the future the problem presented in the case before us.⁵⁶ But the movement towards regulation by the

⁵⁵ See H.R. 3333, 96th Cong., 1st Sess. (1979); S. 611, 96th Cong., 1st Sess. (1979); S. 622, 96th Cong., 1st Sess. (1979).

⁵⁶ The bill presently given the best chance of passage, H.R. 3333, *supra* note 55, could well be read to make the present controversy moot. This would grant radio licenses for an indefinite period (*i.e.*, in perpetuity), *id.* § 471(a), and would allocate new or revoked radio licenses among competing applicants by a lottery system, *id.* § 415(d). It would still be necessary to make application for license assignment to the Commission, which must find that "the purposes of this Act will be served" thereby, *id.* § 421; the purposes of the bill, however, are stated to be that "the public interest is best served [by] marketplace forces, rather than government regulation . . . except that, where it has been determined that marketplace forces are deficient, the Congress finds that government regulation in the public interest is necessary and appropriate." *Id.* § 411.

S. 622, *supra* note 55, also promises to alter the statutory scheme so as to reduce or eliminate the present controversy. Like H.R. 3333, it would make radio license terms indefinite, *id.* § 332(a), and would allocate new licenses by lot, *id.* § 331. It recites a congressional finding that "marketplace competition can be the most efficient regulator of the provision of telecommunications services," *id.* § 2(a)(2), and would prohibit the Commission from requiring radio broadcasters to "adhere to a particular programing format," *id.* § 333(a)(1).

S. 611, *supra* note 54, adopts a more limited approach. It would grant radio licenses for an indefinite term, *id.* § 301(a),

marketplace appears to be accompanied by the exaction for the first time of charges for the use by licensees of the publicly-owned channels, and the benefits thereof would accrue equally to all members of the owning public.⁵⁷ This would be a vast and significant departure from the present system by reference to which we decide the question presently before us.

Looking to the Act in its present form, we hold the *Policy Statement* under review to be unavailing and of no force and effect.

It is so ordered.

but provides for annual Commission review of randomly selected stations to determine if their operations are consistent with the public interest, convenience and necessity, *id.* § 301(b).

⁵⁷ H.R. 3333, *supra* note 55, at § 414. S. 611, *supra* note 55, at § 106, would impose a much more moderate fee on radio broadcasters; and S. 622, *supra* note 55, at § 6, would charge a fee based only on the Commission's costs.

BAZELON, *Circuit Judge, concurring in vacating the decision*: I concur in vacating the decision of the FCC. The Commission's failure to make public the staff study that proved so central to its final decision violates fundamental rulemaking principles.¹ As the majority opinion documents,² the FCC exhibited an almost cavalier disregard for the public's right to comment on the critical data and methodology supporting the Commission's finding that "market forces had provided a significant even if not perfect amount of diversity."³ This conclusion in turn is a vital link in the Commission's reasoning underlying its adoption of the *Policy Statement*. I believe therefore that the record must be reopened to permit meaningful public participation in the Commission's decision.

Because the Commission's procedural unfairness requires vacating the rule, I would not reach the merits of the FCC's interpretation of the public interest standard as applied to the abandonment of a so-called distinctive or unique format. But since the majority has precluded the FCC from adopting a rule contrary to the decision in *WEFM*, I feel compelled to note my agreement with much of Judge Tamm's thoughtful dissent. Implementing the public interest standard calls for a strong dose of policy judgment, a responsibility entrusted by Congress to the FCC.⁴ Yet the majority virtually confines the

¹ "It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of . . . data that, [in] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C.Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

² Majority op. at 17-21.

³ FCC Br. at 18, *see* Memorandum Opinion and Order, 60 FCC 2d 858, 863 (1976).

⁴ In *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C.Cir. 1977), *rev'd* 436 U.S. 775 (1978), a

FCC to a spectator's role in formulating policies that will promote and preserve diversity while minimizing the hazards of government intrusion into the content of broadcasting.

Even apart from this unwillingness to give appropriate deference to the Commission's judgment, I would remain troubled by the route taken by the majority. As I explained at some length in *WEFM*,⁵ regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over others.⁶ The majority acknowledges the "sensitive First Amendment implications"⁷ of government oversight of format choice, but fails to grapple seriously with the constitutional implications of its decision.

I do not contend that there is a simple resolution to the conflict between fostering diversity, on the one hand,

panel of this court reversed the FCC's decision exempting roughly 90% of existing co-located broadcast/newspaper combinations from a rule banning such cross-ownership. We concluded that, on the record developed by the FCC, the Commission had acted arbitrarily and capriciously by limiting divestiture to 16 "egregious" cases. The Supreme Court reversed, suggesting that we had not given sufficient deference to the Commission's judgment. *See* 436 U.S. at 810, 813-815. If we are directed to defer to the FCC's decision in *NCCB*, which seemed sharply at odds with the FCC's mandate, surely we should be hesitant to overturn the Commission's judgment here, where the Commission's accommodation of the conflicting policy interests is neither irrational nor wholly contrary to the purposes of the Communications Act.

⁵ *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 276-81 (D.C.Cir. 1974) (Bazelon, C.J. concurring).

⁶ This problem is not confined to regulation of format choices. *See, e.g., Brandywine-Main Line Radio Inc. v. FCC*, 473 F.2d 16, 63 (D.C.Cir. 1972) (Bazelon, C.J., dissenting), *cert. denied*, 412 U.S. 922 (1973).

⁷ Majority op. at 40.

and protecting the media from chilling government interference on the other. The concerns I expressed in *WEFM* continue to plague efforts to regulate the airwaves in the public interest. Perhaps Congress will exercise its prerogative to cut this Gordian knot and free the choice of format from the bondage of government regulation.⁸ Alternatively, the dawning technological revolution may eliminate this dilemma, by opening up an unprecedented number of accessible outlets for speech.⁹ For the time being, however, the responsibility for reconciling these interests is lodged with the FCC and, to a limited extent, the courts. The record of fifty years of broadcast regulation suggests that the FCC's affirmative efforts to promote diversity have not only failed to achieve that goal, but have entangled the Commission and the courts in perilous government oversight of the content of expression. I cannot so easily reject the FCC's decision to turn away from this troubling experience and to cast its lot with the marketplace.

⁸ As the majority notes, legislation proposing deregulation of radio is now pending before Congress. *See* majority op. at 50-51 & nn.54, 55.

⁹ *See generally* Baer, *Telecommunications Technology in the 1980's*, in *COMMUNICATIONS FOR TOMORROW POLICY PERSPECTIVES FOR THE 1980'S* 61 (G. Robinson ed. 1978).

LEVENTHAL, *Circuit Judge*: I concur in Judge McGowan's excellent opinion for the court.

As sponsor of the court-agency partnership concept and "hard look" doctrine,¹ I add a few words to underscore his observation that this court does not view itself as cast in the role of policymaker.

The court explicitly acknowledges its responsibility not to treat the agency as "a hostile stranger,"² or "with a hostile eye, like an 'intruder'."³ In a working partnership, there may be differences between partners, but there is a mutuality of recognition and respect far removed from the approach taken with any stranger or intruder.

The relationship of court and agency emerges from the functions assigned by Congress to each. Congress has delegated to the agency, here the FCC, the function of making policy. It has given the court the role of review to ensure that an agency decision stays within the intent of the law, and satisfies the requirement of reasoned decisionmaking delineated in Justice Harlan's *Permian* opinion.⁴

¹ *Greater Boston Television Corp. v. FCC*, 143 U.S.App. D.C. 383, 392-95, 444 F.2d 841, 850-53 (1970), *cert. denied*, 403 U.S. 923 (1971); *see also, e.g., Niagara Mohawk Power Corp. v. FPC*, 126 U.S.App.D.C. 376, 383 n.24, 379 F.2d 153, 160 n.24 (1967); *Public Serv. Comm'n of N.Y. v. FPC*, 167 U.S.App.D.C. 100, 117, 511 F.2d 338, 355 (1975).

These opinions rely, *inter alia*, on *United States v. Morgan*, 307 U.S. 183, 191 (1939); *United States v. Morgan*, 313 U.S. 409, 422 (1941); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 16-18 (1936); L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* vii (1965).

² *Greater Boston*, *supra* note 1, 143 U.S.App.D.C. at 394, 444 F.2d at 852.

³ *Public Serv. Comm'n of N.Y. v. FPC*, *supra* note 1, 167 U.S.App.D.C. at 117, 511 F.2d at 355.

⁴ *Permian Basin Area Rate Cases*, 390 U.S. 747, 791-92 (1968).

If hostility to a result leads an agency systematically to distort the testimony of witnesses on material matters, a court could not conscientiously sustain the agency decision.⁵ That is not unlike what the Commission has done in this case by distorting the meaning of our *WEFM* opinion,⁶ a matter Judge McGowan develops with some care. The court-agency partnership depends on mutuality of respect and understanding.

A court must review an agency's action in terms of what the agency says it has considered.⁷ We cannot say that what an agency says it relies on was really unimportant merely because its appellate counsel attempts some repair carpentry.⁸

⁵ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 492-97 (1951).

⁶ *Citizens Committee to Save WEFM v. FCC*, 165 U.S.App. D.C. 185, 506 F.2d 246 (1974) (en banc).

⁷ *SEC v. Chenery Corp. (Chenery I)*, 318 U.S. 80 (1943).

⁸ *FPC v. Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962).

TAMM, *Circuit Judge*, with whom MACKINNON, *Circuit Judge*, concurs, dissenting: I respectfully dissent. The majority's decision, I fear, usurps the proper role of the Federal Communications Commission (Commission) in the formulation of communications policy. In my view, the Commission's determination that application of *Citizens Committee to Save WEFM v. FCC* (WEFM), 506 F.2d 246 (D.C. Cir. 1974) (en banc), will not measurably increase diversity of entertainment formats is neither arbitrary nor capricious. Although I understand the frustration of re-examining an issue purportedly resolved, I believe that the much touted agency-court partnership is well served by continuing dialogue between administrator and judge. I am persuaded that the Commission, which Congress has entrusted with the duty to regulate broadcasting in the public interest, has advanced a reasoned position which this court should uphold.

In WEFM, we decided that when an application to transfer a radio license involves a change in format, the Commission must determine whether the assignor's format is unique and financially viable.¹ If so, the Commission, when faced with substantial questions of fact and significant public opposition to the transfer, must conduct a hearing to discern whether loss of the format is in the public interest before acting upon the application.²

¹ The court noted that an assignor's asserted financial losses will only justify a format change when "those losses [are] attributable to the format itself." *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246, 262 (D.C. Cir. 1974) (en banc).

² 47 U.S.C. § 310(d) (1976) commands the Commission to decide whether an application to transfer a license would be in the public interest. See also 47 U.S.C. § 309(a) & (d) (1976).

The WEFM court based the hearing requirement on the "public interest in a diversity of broadcast formats."³ The court warned that format diversity would not necessarily result from the unregulated play of market forces because broadcasters derive revenue from the sale of time to advertisers, not from the sale of programming to listeners. A station with a larger audience may sell more advertising time, and at higher rates, than a station with fewer listeners. A station with a smaller, but more demographically attractive audience may, however, sell as much or more time as the station with greater numbers of listeners. The court feared that the effect of demographics on the radio market would allow listeners with desirable demographic characteristics—typically eighteen- to thirty-year-olds with discretionary income—to exercise a disproportionate influence upon broadcast decisionmakers who choose formats. Because formats preferred by fewer younger people might prove financially more attractive than formats preferred by a greater number of older or lower income listeners, the court concluded that regulation was necessary to insure diversity. The court's reasoning implicitly suggests that regulation is unnecessary if the radio market reflects the desires of the greatest numbers of listeners.

The Commission responded to WEFM by instituting a proceeding designed to develop methods for implementing the court's ruling.⁴ After reviewing comments of both broadcasters and public interest representatives, the Commission concluded that use of the WEFM doctrine would not demonstrably further the public interest.⁵

³ *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d at 262.

⁴ See Notice of Inquiry, Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations (Notice of Inquiry), 57 F.C.C.2d 580 (1976).

⁵ See Development of Policy re: Changes in Entertainment Formats of Broadcast Stations (Policy Statement), 60 F.C.C.2d 858, 863-66 (1976).

The Commission did not premise its decision upon a rejection of the court's observation that the presence of demographic considerations might increase the influence of certain listeners.⁶ Rather, the Commission first contended that the radio market produces diversity of formats. In support, the Commission presented a study of formats aired in major cities demonstrating "an almost bewildering array of diversity."⁷

Second, the Commission argued that administrative intervention in the format selection process could not be shown to further the public interest.⁸ The Commission

⁶ *Id.* at 863.

⁷ *Id.* The Commission also argued that marketplace allocation accommodates rapidly shifting tastes without the necessity of governmental interference. *Id.* at 864.

⁸ The Commission stated that determining whether a format change would serve the public interest involved three inquiries: "(1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail." *Id.* at 861-62. The Commission suggested that definition of a unique format would present an "acute practical problem." *Id.* at 862; see text at 5-6 *infra*. Addressing the third question, the Commission stated that it is impossible to determine whether consumers would be better off if a new format replaced a unique format. Policy Statement, 60 F.C.C.2d at 862; see note 14 *infra*.

The Commission voiced two other notable concerns. First, it suggested that the *WEFM* doctrine may decrease experimentation in formats, because broadcasters would fear being "locked" into a unique format. *Id.* at 865. Second, the Commission thought that format regulation would chill broadcaster's first amendment rights. *Id.* Although I agree that the first amendment concerns are substantial, see Citizens Comm. to Save WEFM, 506 F.2d at 268 (Bazelon, C.J., concurring), I do not believe the issue need be reached to sustain the Commission's judgment.

contended that stations within a given format are not interchangeable to their respective audiences.⁹ Simply stated, listeners of a particular station within a format category may not be equally willing to listen to any station within the same format category. The Commission's assumption suggests that, for example, in a two station market consisting of a top 40 format and a classical format, a second top 40 station might command a greater audience than the unique classical station.¹⁰

The majority does not dispute the possibility that more listeners may prefer a second top 40 station to a unique classical format. Rather, it suggests that retention of the classical format might be in the public interest because the desires of those preferring the second top 40 station can be easily satisfied by the first top 40 station. Classical tastes, to the contrary, would be less likely satisfied by a top 40 format. The majority explains:

When a unique format is abandoned, those loyal to that format have no adequate substitute in the service area; when a non-unique format is eliminated, its listeners will generally have an adequate substitute in other stations programing the same format. For this reason abandonment of a unique entertainment format raises the special public interest issue by our format cases.¹¹

⁹ The Commission documented this reasonable assumption, see text at 5-6 *infra*, with a study of audience ratings for major radio markets showing that listener preferences are almost as varied within formats as among formats. The Commission concludes that formats of the same type are, therefore, not close substitutes for each other. Policy Statement, 60 F.C.C.2d at 863-64, 873-75.

¹⁰ According to the majority opinion, the Commission may be called upon to review such a change in format when it considers applications either to transfer or to renew a license. See WNCN Listeners Guild v. FCC, No. 76-1692, slip op. at 22 (D.C. Cir. June 29, 1979) (en banc).

¹¹ *Id.* at 39 (footnote omitted).

Thus, the majority introduces a novel doctrine that calculates the public interest without necessary reference to the aural desires of the greatest number of listeners. The majority's approach is fraught with difficulties.

First, *WEFM* does not require use of the "substitution" theory. The *WEFM* court noted that the accuracy of listener preferences in the radio marketplace might be distorted by advertisers' quests for demographically desirable audiences. Any demographic effect on the market, however, is cured if the Commission can ascertain the numbers of people that desire different formats. I harbor serious doubts that regulation based on direct listener "votes" is practicable; but even if it is, the majority, in an effort to justify regulation that may preserve a format favored by fewer listeners than would prefer a changed format, advances the "substitution" principle. Although this theory marks a substantial departure from the reasoning of *WEFM*, the majority offers no independent support for the principle.

Second, use of the "substitution" theory assumes that "unique" formats can be adequately distinguished from "non-unique" formats. Former Commissioner Glen O. Robinson, in his concurring statement in *Notice of Inquiry*, 57 F.C.C.2d at 594-95, emphasized the enormity of this task:

What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of middle-of-the-road formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distin-

guish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would. Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" and that citizens' groups (and, alas, appellate judges) call format. It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved. At that thought the mind swims and the heart sinks. (Footnotes omitted).

The majority does not explicitly concede the difficulty of classifying formats according to listener preference. Nevertheless, it suggests that the Commission may dispense with the requirement that an endangered format be demonstrably "unique" for purposes of ordering a hearing.¹² Although the majority's concession neatly sidesteps the difficulty of defining a "unique" format at the pre-hearing stage, it does nothing to ease the Commission's task once a hearing is held.

Third, the "substitution" theory assumes that it is possible for a federal regulatory agency to measure listener preferences in entertainment formats. I would have thought that the best judge of the most desirable entertainment formats is the listening audience itself. When sufficient numbers of top 40 listeners switch channels to patronize another station which, for purposes of federal regulation is also classified as top 40, they must want to hear a "sound" not previously offered. If consumers purchased radio programming, classical listeners could express a greater intensity of preference simply by paying more than top 40 listeners. Alternatively, if the top 40 listeners intensely preferred a second top 40

¹² *Id.* at 32 n.47.

station, they could respond by paying even more. Because radio broadcasting is a "zero price" good,¹³ however, consumers cannot register their intensity of preference through a price system. "Substitution" as used by the majority is merely a crude device meant to measure the intensity of listener preference.

The "substitution" theory runs afoul of the familiar economic principle that it is either impossible or extremely difficult to compare the intensity of preference of different persons.¹⁴ The range of audience preferences

¹³ See R. NOLL, M. PECK & J. McCOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 32-33 (1973).

¹⁴ See R. POSNER, ECONOMIC ANALYSIS OF THE LAW 11 (2d ed. 1977); L. ROBBINS, AN ESSAY ON THE NATURE & SIGNIFICANCE OF ECONOMIC SCIENCE 138-41 (2d ed. 1940). The Commission stated that no economically rational basis exists for comparing intensity of preference among listeners:

In theory preference should be given to that format which is of greater value to the consumers. Unfortunately, the Commission will find it impossible to measure the relative values of different formats because there exists no litmus or *a priori* way of measuring how much particular formats are worth to the audiences. All that can be known is simply how many people listen to available programs.

Unfortunately, the size of a station's audience is not necessarily an appropriate measuring stick of the degree of satisfaction which listeners derive from its programming. That is, two different formats which attract audiences of equal size may not be of equal value. Preferences expressed by the audience of one format may be much stronger than preferences for the other, in which case the former should be the more valuable. In order to ascertain which format is the more valuable, one would have to know the intensity of demand for each. Again, there exists no acceptable, reliable way of measuring aspects of these consumer preferences because consumers

within the same format, for example, suggests that the Commission would be hard pressed to determine how much and how many listeners would prefer a variation of a pre-existing format to a unique format. Given the many aspects of a specific station's "sound," it is difficult to measure the amount or the depth of audience acceptance of a changed format without allowing broadcast of the new format—a solution which eradicates the controversy.

Finally, the majority's "substitution" theory assumes that the Commission will be able to balance number of listeners against intensity of format preference. Consider the top 40/classical format hypothetical. If twenty percent of the listening audience would mildly prefer a second top 40 format and five percent would vigorously prefer retention of the classical format, does the size of one audience outweigh the intensity of preference of the other? The majority opinion offers no clue.

In sum, the majority's opinion presents an unjustified rebuttal to the Commission's conclusion that the public interest may not be discernibly furthered by implementation of the *WEFM* doctrine. The majority has not explained how to decide whether a specific format is unique, how to measure the number of listeners who favor a changed format, or how to compare the intensity of preference between listeners who desire retention of a unique format and those who prefer a variation of a pre-existing format. Finally, the majority has failed to identify the principle within the Communications Act

are not required to pay for the opportunity to listen to radio.

Policy Statement, 60 F.C.C.2d at 873; see Bruce M. Owens, "Radio Station Format Changes, Diversity and Consumer Welfare," Appendix to Brief for National Association of Broadcasters.

that mandates regulation favoring the interests of fewer listeners over the interests of more listeners.

I am also troubled by another aspect of the majority opinion. The majority notes that petitioners allege that they did not have an adequate opportunity to comment on two studies relied upon by the Commission. The majority explicitly declines to "decide whether the failure to obtain public comment on the study is itself of sufficient gravity to warrant rejection of the *Policy Statement*,"¹⁵ although it says that this "procedural unfairness, coupled with the substantive uncertainty flowing from the lack of adequate adversarial testing during the comment period, is enough to make us view skeptically the Commission's use of the study."¹⁶ On the assumption that the former statement clearly asserts that the majority opinion does not rest upon a procedural ground, I have directed the thrust of these dissenting remarks to the substantive validity of the Commission's decision.

I note in passing, however, that the two statements taken together may be read as suggesting that the alleged procedural unfairness was not serious enough to require a remand to the agency, yet was serious enough to allow the majority to subject the agency to unusually strict scrutiny. In my view, if the majority believes that the Commission has committed procedural error sufficient to alter the normal standard of review of administrative decisions, then a remand to the Commission is proper.¹⁷

¹⁵ *WNCN Listeners Guild v. FCC*, No. 76-1692, slip op. at 19 n.24.

¹⁶ *Id.* at 37.

¹⁷ See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-94 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); see also *South Prairie Constr. Co. v. Operating Eng'rs*, 425 U.S. 800, 805-06 (1976); *NLRB v. Food Store Employees*, 417 U.S. 1, 9-10 (1974); *FPC v. Idaho Power Co.*, 344 U.S. 17, 22 (1952).

A remand would afford the petitioners greater opportunity to comment upon the studies, offer the Commission the opportunity to build a better record for review, and allow this court to meet the Commission's contentions head on.

More important than the specifics of the current debate, is the lack of deference the majority accords the Commission's assessment of market conditions. Although the majority acknowledges the expertise of the Commission to challenge the factual premises that underly the *WEFM* decision,¹⁸ it mounts untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's.

The Supreme Court has often reminded this court of the appropriate relationship between administrative agency and reviewing court. Only last year, the Court, reversing our finding that the Commission had acted improperly in "grandfathering" certain newspaper-broadcast station combinations, noted that the Commission's decision to adopt a general policy of prospective divestiture was primarily judgmental or predictive. "In such circumstances, complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978) (quoting *FPC v. Transcontinental Gas*

¹⁸ *WNCN Listeners Guild v. FCC*, No. 76-1692, slip op. at 36.

Pipe Line Corp., 365 U.S. 1, 29 (1961)). In the present case, the majority disregards the Commission's expert knowledge and, in so doing, violates the mandate of *FCC v. National Citizens Committee for Broadcasting*.

The majority has lost sight of our role as a reviewing court whose proper function is to uphold an agency's reasonable judgment. The Commission's determination that use of the *WEFM* doctrine will not further the public interest is well within the parameters of reason. Faced with a conflict between judicial and administrative policies,¹⁹ I believe we are obliged to uphold the Commission. The court's decision today, a reversal based on unverified factual assumptions about listener preferences and behavior, extends judicial review of administrative policy-making processes beyond its permissible bounds.²⁰

¹⁹ The majority argues vigorously that *WEFM* is "law" and not "policy." See *id.* at 34. Of course, it is both. The Commission has not asserted that it is free to disregard the mandate of *WEFM*, it simply suggests that the definition of the public interest put forth in that decision is neither the only possible nor the preferable formulation. The majority concedes, as it must, that the public interest standard may subsume different, even opposing, policies. *Id.* at 35 n.51. Compare *National Citizens Comm. for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978) with *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Although the Commission's proposal closely tracks an interpretation we have previously rejected, the agency has now presented more persuasive reasons why its view should be upheld. For what purpose is the agency-court partnership if we cannot maintain an open mind?

²⁰ See *Polsby, F.C.C. v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, THE SUP. CT. REV. 1, 17-22 (1979).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

[Filed Jun. 29, 1979]

No. 76-1692

WNCN LISTENERS GUILD and CITIZENS
COMMUNICATION CENTER, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

AMERICAN BROADCASTING COMPANIES, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS,
INTERVENORS

No. 76-1793

CLASSICAL RADIO FOR CONNECTICUT, INC., and
COMMITTEE FOR COMMUNITY ACCESS, PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF BROADCASTERS,
CORNHUSKER TELEVISION CORP., ET AL.,
INTERVENORS

No. 77-1951

THE OFFICE OF COMMUNICATION OF THE UNITED
CHURCH OF CHRIST, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

METROMEDIA, INC.,
NATIONAL RADIO BROADCASTERS ASSOCIATION,
NATIONAL BROADCASTING COMPANY, INC.,
CBS, INC., INTERVENORS

PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BEFORE: Wright, Chief Judge; Bazelon, McGowan,
Tamm, Leventhal, Robinson, MacKinnon,
Robb, and Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on petitions for review of orders of the Federal Communications Commission; briefs were filed by the parties; and the case was argued before the Court sitting *en banc*. On consideration thereof, it is

ORDERED AND ADJUDGED, by the Court, *en banc*, that the Memorandum Opinion and Order of the Federal Communications Commission on review

herein (60 F.C.C. 2d 858) is vacated, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 29, 1979

Opinion for the Court, concurred in by Chief Judge Wright, and Circuit Judges Leventhal, Robinson, Robb, and Wilkey, filed by Circuit Judge McGowan.

Concurring opinions filed by Circuit Judges Bazelon and Leventhal.

Dissenting opinion filed by Circuit Judge Tamm. Circuit Judge MacKinnon joins in Circuit Judge Tamm's dissenting opinion.

APPENDIX C

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 20682

IN THE MATTER OF
DEVELOPMENT OF POLICY RE: CHANGES IN THE
ENTERTAINMENT FORMATS OF BROADCAST STATIONS

NOTICE OF INQUIRY

(Adopted: December 22, 1975;

Released: January 19, 1976)

BY THE COMMISSION: CHAIRMAN WILEY ISSUING A
STATEMENT; COMMISSIONERS HOOKS AND ROBINSON
CONCURRING AND ISSUING STATEMENTS.

1. The Commission has under consideration its policies and practices with respect to changes in the entertainment formats of broadcast stations.

2. The need for this proceeding arises in view of the rulings in several recent entertainment format change cases, including *Citizens Committee To Save WEFM, Inc. v. Federal Communications Commission*, 506 F.2d 246 (1974). This case arose out of an application by Zenith Radio Corporation, licensee of Station WEFM, Chicago, Illinois, to assign its broadcast license to GCC Communications of Chicago, Inc. [hereinafter GCC] pursuant to 47 U.S.C. 310(d),

and the accompanying proposal by GCC to change the format of the station from classical music to popular, or rock and roll.

3. In response to a petition to deny the application, filed pursuant to Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. 309 (d), the Commission found that since there were two other stations serving the Chicago area with a classical music program format, the public interest in diversity of broadcast entertainment formats was not sufficient to override the legitimate protections accorded broadcast licensees by the Communications Act and the First Amendment from Government intrusions into their program content judgments. *Zenith Radio Corporation*, 38 FCC 2d 838, *reconsideration denied* 40 FCC 2d 223 (1973). Appended to Commission's decision on reconsideration approving the assignment applications was a separate opinion, entitled "Additional Views of Chairman Burch," which was joined by all but one Commissioner. These "Additional Views" explained the underlying analysis on which the Commission's decision was based.

4. Specifically, the six Commissioners pointed to the Supreme Court's decision in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940), that "[t]he regulatory responsibility of the Commission in the broadcast field essentially involves the maintenance of a balance between the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public in-

terest standard provided in the Communications Act, on the other." The Commissioners went on:

The Commission has struck this balance by requiring licensees to conduct formal surveys to ascertain the need for certain types of non-entertainment programming, while allowing licensees wide discretion in the area of entertainment programming. Thus with respect to the provision of news, public affairs and other informational services to the community, we have required that broadcasters conduct thorough surveys designed to assure familiarity with community problems and then develop programming responsive to those identified needs. [footnote omitted] In contrast, we have generally left entertainment programming decisions to the licensee or applicant's judgment and competitive marketplace forces. As the Commission stated in its *Programming Policy Statement*, 25 Fed. Reg. 7293 (1960), "[o]ur view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicants, since as a matter of public acceptance and of economic necessity he will tend to program to meet the preference of his area and fill whatever void is left by the programming of other stations."

5. The Commissioners also stated that this discretion allowed broadcasters by the Commission's policy permitted experimentation in program formats that would be seriously inhibited by a policy of further Government intrusion into programming judgments which would have the undesirable effect of "locking"

broadcasters to the present formats. "[I]nhibiting licensee discretion to change or modify unsuccessful program formats appealing to minority tastes will have . . . the effect of lessening the likelihood that such programming will be attempted in the first place." However, it was emphasized by the Commission that the discretion accorded broadcasters was not "unbridled," but must be exercised in a manner consistent with the licensee's public obligations. The Commission therefore resolved to take an "extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming." It was further explained that whenever facts "indicate that the [proposed new] format is not reasonably attuned to community tastes or that the format change will eliminate a service to the public not otherwise available, a survey of entertainment tastes or a hearing may be required."

6. In applying this considered policy to the proposed change of WEFM's format, the Commission found that since there was no substantial dispute as to either the existence of classical music programming on other stations serving the area, or that the proposed new format would be reasonably attuned to community tastes, a hearing would serve no useful purpose and that grant of the application to assign the station's license would serve the public interest. The Court of Appeals *en banc*, however, set aside the Commission's orders.

7. The court, after reviewing the cases, beginning in 1970, in which it had considered format changes,¹ summarized the teaching of these earlier decisions as follows:

There is a public interest in a diversity of broadcast entertainment formats. The disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio, at least at their first-preference level. When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial

¹ See *Citizens Committee to Keep Progressive Rock v. FCC*, 156 U.S. App. D.C. 16, 478 F.2d 926 (1973); *Lakewood Broadcasting Service, Inc. v. FCC*, 156 U.S. App. D.C. 9, 478 F.2d 919 (1973). *Hartford Communications Committee v. FCC*, 151 U.S. App. D.C. 354, 467 F.2d 408 (1972); *Citizens Committee to Preserve the Present Programming of WONO(FM) v. FCC*, No. 71-1336 (D.C. Cir.) (Order May 13, 1971); *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-FM) v. FCC*, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970).

losses in providing the special format; those losses must be attributable to the format itself in order logically to support an assignment that occasions a loss of the format.

8. The question of changes in the entertainment formats of broadcast stations presents two important questions, namely:

- (1) Whether the public interest standard of the Communications Act of 1934, as amended, requires close scrutiny of broadcast entertainment formats to assure an appropriate diversity? and,
- (2) Whether the First Amendment to the Constitution permits the close scrutiny of broadcast program content judgments suggested by the Court of Appeals?

9. We are deeply concerned that, by rejecting the programming choices of individual broadcasters in favor of a system of pervasive governmental regulation, the Commission would embark on a course which may have serious adverse consequences for the public interest. At the same time, we are concerned that such a course may involve an overly optimistic view of what can realistically be achieved through government regulation.

10. The Court, in WEFM, holds that there is "no longer any room for doubt that, if the FCC is to pursue the public interest, it may not at the same time be able to pursue a policy of free competition." By way of explanation, the Court added:

There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger or a demographically more desirable audience for advertisers.

11. The Commission acknowledges the force of the Court's point, that it would be factually erroneous to assert that the market forces which operate on radio stations are identical with the forces which produce the preference hierarchies of the members of the community of license. But implicit in that observation is the notion that the Commission, if it tries hard enough, can come up with a meter of collective welfare which is superior to the advertisers' marketplace. There are excellent reasons for supporting, however, that the search for the public interest in entertainment formats may be a difficult and ultimately futile exercise. See, generally, K. Arrow, *Social Choice and Individual Values* (1951).

12. *Broadcast Yearbook* lists upwards of eighty entertainment formats used by American radio stations. Excluding those with a small number of listed stations, there appear to be about a dozen principal formats: black ("soul"), country and western, classical, easy listening, educational, middle-of-the-road, progressive, religious (gospel), rock, spanish, top-40, talk, variety. These principal formats, together with a soupçon of minority formats, form the entertain-

ment programming for the two dozen or so aural services that may be audited in a medium-large market. Under the Court's mandate, a problem could arise in determining whether an identified format such as classical music, may have clearly delineated "sub-formats."² Moreover, the labeling of formats is a subjective matter and similarly labeled ones may in fact differ, while differently labeled one may in fact substantially overlap. Distinctions in this field are extremely hazy and subjective. The definition and identification of formats requires a composite analysis of the various elements of program service and listener perceptions of the station's overall programming. We question therefore whether it is appropriate or productive for an administrative agency to enter this quagmire in the absence of a compelling public interest need.

13. Our traditional view has been that the station's entertainment format is a matter best left to the discretion of the licensee or applicant, since he

² In the court's view, the Commission may have to go so far as to consider that, "[o]ne station might not, for example, play music composed in this century, while another might concentrate on twentieth century works." In his dissent, Judge MacKinnon pointed out his concern (as well as ours) with the danger of Government intrusion "when we are forced to draw a distinction based on differences between 'classical' music. . . ." As stated in *Times Film Corp. v. Chicago*, 5 L. Ed. 403, 425-26 (1961), "[i]t is not for the government to pick and choose according to the standards of any religious, political or philosophical group." A line between these extremes and one requiring the Commission to involve itself in determining musical formats—or the differences in such formats—is a difficult one to draw.

will tend to program to meet certain preferences of the area and fill significant voids which are left by the programming of other stations. The Commission's accumulated experience indicates that licensees frequently shift and modify their entertainment formats in response to changing listening tastes, competition, and financial necessity. Frequently, when a station changes its format, other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format. This view has been borne out in two previous format change cases in which the "gap" left by Commission approval of a change of format was quickly filled by another station serving the same area. See *Lakewood Broadcasting Service v. FCC*, 156 U.S. App. D.C. 9, 14n.10, 478 F.2d 919, 924 n.10 (1973), *Citizens Committee to Keep Progressive Rock v. FCC*, 156 U.S. App. D.C. 16, 22n.16, 478 F.2d 926, 932n.16 (1973). We do not pretend that such an approach results in a perfect accommodation of "all major aspects of contemporary culture" (*WGKA, supra* at 269). It has, however, in our view, resulted in a wide diversity of entertainment formats. See, e.g., Appendix A.

14. A contrary policy may well disserve the public interest. Its most logical and probable result may be, we believe, to discourage broadcasters from selecting an entertainment programming which is "unique or otherwise serves a specialized audience that would feel its loss." Such broadcasters would fear themselves "locked in" to a format. Unable to extricate themselves from the unsuccessful format without facing the prospect of a costly and time-consuming hearing,

broadcasters may not try new and innovative programming. This set of circumstances may have a tendency to result in conformity. Rather than attempting innovative programming, with the prospect of costly hearings and/or appellate review proceedings, and with a valuable franchise in jeopardy, the average broadcaster will stand pat. This inhibition of licensee discretion to change or modify formats to appeal to minority taste may well diminish rather than expand diversity.

15. Over the years, the Commission has sought to avoid dubious intrusions into the broadcaster's programming judgments. As a matter of policy, the Commission has permitted musical entertainment format changes as the marketplace might dictate. Now, however, the policy suggested by the Court of Appeals seems to require a much closer scrutiny of proposed changes in the programming decisions of broadcasters. We seriously question whether, under the Act's public interest standard, such close scrutiny is necessary or appropriate. In short, we are concerned that the course charted by the Court may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to (or more in the public interest than) that favored by the marketplace. For this reason, we are instituting this inquiry to examine whether the Commission should play any role in dictating the selection of entertainment formats. Parties who favor some degree of government involvement are asked to address the following questions:

- (a) When should the Commission become involved in format changes—i.e., in all cases or only those where there is a significant public outcry? See *Citizens Committee to Keep Progressive Rock*, *supra* at 934. Also, how do you determine significant public outcry?
- (b) Should the Commission attempt to categorize entertainment formats and, if so, on what basis?
- (c) Other than a general objection to a proposed change in entertainment format, what burdens should be placed on members of the public to demonstrate that a unique format is being abandoned?
- (d) If an applicant proposes to change from an alleged unique format, what showing is necessary to justify the proposed change? Also, if financial hardship is alleged, what showing should be submitted by an applicant justifying the losses?
- (e) In cases of an alleged unique format, what consideration should be given to factors such as: (i) the similarity of other formats in the market; (ii) the population and areas served by broadcast facilities; (iii) the audience of the respective stations; (iv) the hours of operation, type of service (*e.g.*, AM, FM, educational), and the like? Further, in hearing cases involving alleged unique formats, what should be the burdens of the respective parties?

- (f) If an applicant proposes to change from one unique format to another, should a hearing be held to determine which will better serve the public interest?
- (g) Should the Commission consider a change from an alleged unique format only when the station is being sold, at license renewal time, or at other times?
- (h) Is the maximization of program diversity necessarily in the public interest? That is, does the maximization of entertainment formats necessarily result in the maximization of consumer satisfaction?

16. Additionally, we invite interested parties to address the First Amendment ramifications of the policy suggested by the Court of Appeals. While the Supreme Court has approved some FCC oversight of programming, it is evident that our authority in this area is not unlimited. Indeed, as noted in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (1969), some regulations, such as a "refusal to permit the broadcaster to carry a particular program," would raise serious First Amendment issues.

17. It is, of course, difficult to contest the proposition that the "disappearance of a distinctive format may deprive a significant segment of the public of the benefits of radio, at least at their first preference level," as stated in *WEFM*. As suggested in *United States v. CIO*, 335 U.S. 106 (1948), however, any administrative regulation or policy tending to constrain an applicant from selecting programming of its

choice "must be justified by the existence and immediate impendency of dangers to the public interest which clearly and not dubiously outweigh those involved in the restrictions."

18. The First Amendment, of all areas of constitutional law, is an area where intrusions are most assiduously to be avoided. For over 40 years, therefore, broadcast applicants have been free to select their own programming formats. Obviously the broadcaster's determination as to whether to select one format over another is based on its own evaluation of the market. As noted elsewhere herein, leaving such choices to the applicant has nonetheless resulted in a wide diversity of entertainment formats. In the present controversy, we are being called upon to substitute our judgment for that of the applicant on the most subjective grounds imaginable without any clear danger to the public interest. In his concurring opinion in *WEFM*, Judge Bazelon stated his concern—and ours—with the fact that the Court had set a "broad view of the Commission's authority in the delicate area of programming with nary a syllable spoken to the First Amendment implications of its decision." We believe that this issue warrants a prompt and thorough review and, accordingly, such comments are requested. Specifically, would any system of Commission intervention in, or selection of, licensee entertainment formats violate the First Amendment?

19. This action is taken, pursuant to Section 403 of the Communications Act of 1934, as amended. In-

terested parties responding to this Notice of Inquiry may file comments on or before February 19, 1976. Reply comments may be filed on or before March 3, 1976. An original and eleven copies of each formal response must be filed in accordance with the provisions of Sections 1.49 and 1.51 of the Commission's Rules. However, in an effort to obtain the widest possible response to this proceeding from licensees and members of the public, informal comments (without extra copies) will be accepted. Copies of all pleadings filed in this matter will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX A

FORMAT TYPE	MARKETS			
	New York	Los Angeles	Chicago	Total
1. Agriculture & Farm	0	0	0	0
2. Beautiful Music	1	5	8	14 (8%)
3. Black	3	6	5	14 (8%)
4. Classical	3	2	2	7 (4%)
5. Contemporary	5	9	6	20 (12%)
6. Country & Western	1	5	5	11 (7%)
7. Ethnic/Foreign Language (Except Spanish)	1	1	4	6 (4%)
8. Golden Oldies	1	2	1	4 (2%)
9. Middle-of-the-Road	9	11	15	35 (21%)
10. News	2	2	3	7 (4%)
11. Progressive (Rock)	2	1	5	8 (5%)
12. Public Affairs	2	0	0	2 (1%)
13. Religious	2	4	0	6 (4%)
14. Rock	2	2	3	7 (4%)
15. Spanish	2	2	2	6 (4%)
16. Talk	3	2	0	5 (3%)
17. Top 40	2	3	0	5 (3%)
18. Varied	2	1	5	8 (5%)
19. Other	0	1	0	1 (1%)
Total Stations	43	59	64	166 (100%)
Number of Separate Formats	17	17	13	

SEPARATE STATEMENT OF
CHAIRMAN RICHARD E. WILEY

In Re

Notice of Inquiry in the Entertainment Formats
of Broadcast Stations

(Docket 20682)

The Court of Appeals, in *Citizens Committee to Save WEFM v. FCC*, 506 F. 2d 46 (D.C. Cir. 1974), states that the public interest cannot be served adequately by a policy of free competition in the selection of entertainment formats. The Court, it appears, believes that FCC Commissioners are capable of doing

a better job of distributing formats than that presently performed by the marketplace. While I appreciate this judicial vote of confidence in our ability and expertise, I cannot honestly say that I share the Court's optimism. Indeed, I am concerned that FCC involvement in this area will result in extensive regulatory delay and will inhibit innovation and flexibility in the development of formats. Even after all relevant facts have been fully explored in an evidentiary hearing, we would have no assurance that a decision finally reached by our agency would contribute more to listener satisfaction than the result favored by station management.

Based on the arguments I have heard to date, I do not believe that there is any objective or principled ground for agency decision-making in the format area. The Court of Appeals recognized the subjectivity involved in identifying a "unique" format, but seems to suggest that we should "know it when [we hear] it." *Citizens Committee to Preserve WGKA, v. FCC*, 436 F. 2d 263, 265 n. 1 (D.C. Cir. 1970). I find it difficult to square this standard with the usual requirement that agencies have a reasoned explanation for their decisions—and with the time-honored principle that the broadcast licensee has "both initial responsibility and primary responsibility" in programming matters and that "it has wide discretion and latitude that must be respected even though, under the same facts, the agency would reach a contrary conclusion." *National Broadcasting Co. v. FCC*, 516 F. 2d 1101, 1118 (D.C. Cir. 1974 (opinion of Judge Leventhal)).

It would be reasonable, of course, to state that every station is unique in the literal sense of that term; each provides a particular attraction to the people who prefer it to other stations and each contributes in some measure to format diversity. If we were to deal with the problem only in this literal fashion, we would never have occasion to bar a change of format—for the loss to diversity caused by the change would be offset by a corresponding gain (represented by the new format). But, while the Court asks us to draw fine distinctions among similar entertainment services (even to the point of distinguishing classical stations specializing in “twentieth century works” from those concentrating on the older classic), I do not understand it to be emphasizing the unique format in this strict sense. It appears, therefore, that we are called upon to judge whether an existing format contributes *more* to diversity than a proposed format would. While we are not offered any yardstick by which to measure degrees of diversity, it seems that we are expected to use our best efforts to discourage stations from competing with each other in catering to popular tastes.

Under this system, a station which was permitted to continue a successful format would benefit considerably from what would be, in effect, a government-managed cartel. This station, being protected against competitive entry, might enjoy profits considerably in excess of those it could earn in an open market. I seriously doubt, however, that the many citizens who listen to this format would share the station's

enthusiasm for the FCC's benevolent regulation. Unless we have abandoned all faith in a free economy, we must assume that the public will benefit from a competitive struggle and even from the potential competition made possible by a policy of open entry.

I do not imagine that a competitive system will achieve perfection or accommodate every possible minority taste. However, it seems to be the only means of preserving an essential flexibility in radio broadcasting and it will free the FCC from the fruitless task of adjudicating endless and bitter disputes among broadcasters (who would otherwise be forced to turn to the government, rather than the public, in their quest for business advantages).

CONCURRING STATEMENT OF
COMMISSIONER BENJAMIN L. HOOKS

In Re: Changes in Entertainment Formats
of Broadcast Stations

The matter of Commission intercession in entertainment program formats is, indeed, vexation. Our indisposition to issue programming directives out of Washington is bred by our historic alignment with the ideal of a media free of government influence. With respect to the broadcast media, a publicly regulated resource, the line between “saying too much and saying too little”¹ is not solid; it is mostly amorphous and pursues a rambling road.

¹ “[I]n applying the public interest standard to programming, the Commission walks a tightrope between saying

Ever since the *Voice of the Arts* case² where we were instructed by the court to look into any abandonment of a unique format which was opposed by significant numbers in the community, the Commission has uncomfortably juggled this problem. To date, we have no comprehensive policy with which to map our approach, progress, or final destination. The Commission, therefore, has wisely instituted this proceeding to explore the territory.

I was one of those who joined former Chairman Dean Burch's statement in *WEFM* wherein we expressed a natural dread of becoming too deeply enmeshed in format choices.³ But, after reading again

too much and saying too little. In most cases it has resolved this dilemma by imposing only general affirmative duties—e.g., to strike a balance between various interests of the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. The licensee has broad discretion in giving specific content to these duties. . . . Given its long-established authority to consider program content, this approach probably minimizes the dangers of censorship or pervasive supervision."

Banzhaf v. FCC, 405 F.2d 1082, 1095 (D.C. Cir. 1968), cert. denied, *sub nom. Tobacco Institute v. FCC*, 396 U.S. 842 (1969).

² *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970).

³ *Zenith Radio Corporation*, 40 FCC 2d 223 at 230 (1973). Even there, however, we noted:

This is not to say, however, that licensees or applicants have unbridled discretion in selecting their entertainment formats. The Commission will take an extra hard look at the reasonableness of any proposal which would

the decisions in the so-called "format cases,"⁴ and, however loathe we personally may be to lay hands on the format porcupine, the final responsibility of assuring service to all segments of the community may ineluctably abide here.

Moreover, tangential involvement in program categories would not be wholly precedential. In our 1960 *En Banc Programming Inquiry*, 20 P & F Radio Reg. 1901 (1960), we set forth fourteen specific categories of programming we deemed essential to satisfy the public's varied interests. We have long held that minorities must be served. And, more recently, we have decreed the need for a special programming effort to serve children, going so far as to declare that a station must provide "a reasonable amount of programming which is designed to educate and inform—and not simply to entertain."⁵

With specific reference to format categories, I have stated:

[A]s a regulator, I must be equally aware that the Commission's statutory duty to ensure that licensees operate in the public interest carries

deprive a community of its only source of a particular type of programming.

Id. at 231.

⁴ See *Majority Order*, at p. 3, n. 1.

⁵ *Children's Television Report and Policy Statement*, 50 FCC 2d 1, 6 (1974). In that same *Report* we repeated: "As we have long recognized, broadcasters have a duty to serve all substantial and important groups in their communities. . . ."

Id. at 5.

with it an obligation to see that substantial segments of the community are not subject to a total blackout of programming attuned to their special needs and interests. To permit a situation in which, hypothetically, every station in a given locale could program identically so as to optimize audience size—whether the preferred programming be all-classical, middle-of-the-road, two-way talk, etc.—would be to countenance the same kind of improper exclusion that minorities suffered during the earlier days of the media, of which unfortunate vestiges remain today.⁶

I remain of that mind and hope that, rather than ducking, we use this proceeding to meet the problem of blanket deprivation head on.

Without intending oversimplification, the issue here settles neither on free speech nor on a free market.⁷

⁶ *Dissenting Statement of Com'r Hooks, Assignment of WQFM-FM, Milwaukee, Wisconsin, Report No. 11420, April 3, 1973.*

⁷ With respect to free speech, the First Amendment—which relates to abridgement of speech and the press—was not intended as a defense *against* media diversity. In broadcasting law, the First Amendment rights enure primarily to the listening public and the Constitutional standards have been applied to coincide with this country's scheme of privileged trusteeship for the electronic media. See *Red Lion Broadcasting Co. v. FCC*, 359 U.S. 367 (1968).

As to the free market arguments, I contend inapposition. Absolute free market theorems suggest a condition of free market entry which clearly lets out broadcast licenses. And, there can be no unrestricted financial exploitation of a communal resource where the property rights repose in the public. A licensee is not a landlord with an unlimited right to alter the premises for commercial advantage, a licensee is merely a spectral tenant with caretaking responsibilities.

The issue is whether the rights of minority audiences are subordinate to the entrepreneurial quest for profit maximization.⁸ We are not naive enough to suppose that formats are changed for any altruistic purpose.

While I enthusiastically endorse the right of a conscientious broadcaster to reap all due economic rewards, the primary function of a license is service to the public—not service to the licensee. Once a licensee has used the spectrum to promote a particular format and snared a loyal following, the desertion of that format for the sheer sake of enlarged profits and without regard to the public interest, deserves some scrutiny.

Chillingly boundless are the number of hypothetical extremes to which the court's doctrine could be taken if extrapolated to logical absurdities. Further, as Justice Holmes remarked: "The life of the law is not logic, it is experience." In the real world, some of the possibilities portended become unlikely. I, too, would throw up my hands in helplessness if I believed the courts expected an intricate policy of format allocation on a grand scale and a system of intimate monitoring.

However, I believe a common sense interpretation of the judicial edicts is preferable. To determine whether a format is unique in the community, I would

⁸ Profit maximization is not necessarily coextensive with audience maximization as Commissioner Robinson suggests in his discussion of demographics. The game is the capture of mass affluence, not merely the mass. The demise of Lawrence Welk from network TV was based on its appeal to a relatively impecunious senior citizenry.

use only a threshold test of conspicuous generic equivalence: I would not seek identity through minute analyses. To determine whether there is "significant grumbling" about a proposed format change, I would compare the magnitude of the protest to the magnitude of the service area using a zone of reasonableness concept. I would interpret economic feasibility as consistent with a profit comparable to the average station in the market (or like market) since I don't believe the court expects anybody to labor for less than fair recompense.

Using the above guidelines, and under the circumstances likely to occur, the trade-off between government obtrusion and economically-inspired exclusion becomes reasonable. Our energies would be best spent, I believe, in devising tenable standards to apply rather than battling speculative aberrations.

CONCURRING STATEMENT OF
COMMISSIONER GLEN O. ROBINSON

Among the many public controversies in which we have been ensnared lately, the matter of radio program format changes is not prominent. Indeed, I venture to say that most of the broadcast industry itself perceives, dimly if at all, that there is any problem here that merits more than passing attention. This evident lack of concern even by the industry is perhaps understandable in light of the general public preoccupation with television, but it is myopic. The issues which we seek to resolve in this inquiry have far-reaching ramifications not merely for radio

but for the entire broadcast industry. In particular, the First Amendment questions are as subtly difficult as have been encountered anywhere—a fact that neither the industry nor, I daresay, the Court of Appeals, has fully appreciated. While I agree with what the Commission says in the accompanying Notice, I think some additional comments on this vexing problem are appropriate.

I. *Background*

A short background sketch of the problem is useful to explain how we got into this predicament.¹ More or less it started with *Citizens Committee to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970). The Commission there granted an assignment application where the assignee proposed to abandon a classical music format in favor of another format, one which is expected to make more money, a "blend of popular favorites, Broadway hits, musical standards and light classics." An *ad hoc* Atlanta citizens' group filed a petition for review and the Court of Appeals reversed. Section 310(b) of the Communications Act, said the Court, requires the Commission affirmatively to find, before approving it, that a proposed assignment will serve the public interest; section 309(e) requires that disputed substantial and material questions of fact must be resolved

¹ For a useful review of the problem in the general context of regulating program diversity, see Note, *Judicial Review of FCC Program Diversity Regulation*, 75 Colum. L. Rev. 401 (1975).

at a formal hearing; and that, in view of Congress' undoubted intention that "all major aspects of contemporary culture . . . be accommodated by the commonly-owned public resources whenever that is technically and economically feasible," 436 F.2d at 269, the proposed abandonment of a format "unique" in a market could not be approved without the Commission considering the public interest implications of abandonment at a hearing.

Lakewood Broadcasting Service, Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973) and *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973), decided by different divisions of the Court of Appeals on the same day, modified *Voice of Arts* in one respect, and introduced some new wrinkles of their own. *Lakewood* concerned the proposed abandonment of an all-news format in favor of country and western music in metropolitan Denver, *Progressive Rock* concerned a proposed switch from rock music to a middle-of-the-road format in the Toledo, Ohio, market. The former case, the Court found, the Commission had decided rightly: a close reading of the record indicated that there was no dispute over questions of fact but only over the legal conclusions to be drawn therefrom. In *Progressive Rock*, however, the Court brushed aside the submission that Toledo's other aural services furnished at least some progressive rock music to that genre's enthusiasts: "We deal with format, not the occasional duplication of selections." 478 F.2d at 932.

In one respect, at least, *Progressive Rock* trimmed the breadth of *Voice of Arts*: rather than apparently requiring a hearing whenever a proposed format change would apparently lessen diversity in a particular market, a hearing would be required only "when public grumbling reaches significant proportions." 478 F.2d at 934. But at the same time, the Court made it clear that with respect to the law of format changes, it had no sympathy for the Commission's desire "for as limiting an interpretation as possible." 478 F.2d at 930. And it went on to suggest that the decisive question respecting whether an assertedly "unique" format might be abandoned was not whether it had been profitable in the past or was currently profitable, but rather whether it was "economically feasible." 478 F.2d at 932.

Citizens Committee to Save WEFM v. FCC, 506 F.2d 46 (D.C. Cir. 1974) capped this series of cases, and in two respects completed it. First, as the decision of an *en banc* court, *WEFM* is, of course, "the law of the circuit," and binding on all subsequent divisions of the Court until modified either by the Court *en banc* or by the Supreme Court.² Second, *WEFM* spelled out more explicitly the reason for the rule. Rather than merely asserting, as the prior cases had, more or less cryptically, that there is a

² Judges Robb and McKinnon dissented. Judge Bazelon specially concurred in a thoughtful opinion which suggests a basically different approach to the problem than that of the Court's opinion. While I vastly prefer Judge Bazelon's approach to that of the Court, I think it is not without difficulties, some of which I shall note below.

public interest in format diversity, the Court made clear the unacceptability of the Commission's aversion to deciding which among several proposed entertainment formats would best serve the public interest. The Court concluded that the Commission's reliance on market forces to allocate formats properly was unreasonable. Such comparisons of protected speech—weighing one protected speech against another to determine which is more in the public interest—is something the Commission has tried to avoid. In *WEFM*, the Commission was told, this policy is illegal.

“[T]here is no longer any room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition. . . . There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger *or* a demographically more desirable audience for advertisers. Broadcasters therefore find it in their interest to appeal . . . to the particular audience that will enable them to maximize advertising revenues. If advertisers on the whole prefer to reach an audience of a certain type . . . then broadcasters, left entirely to themselves by the FCC, would shape their programming to the tastes of that segment of the public. This is inherently inconsistent with ‘securing the maximum benefits of radio to all the people of the United States’ and not a situation that we can

square with the statute as construed by the Supreme Court.”

506 F.2d at 267, 268 (citations omitted; emphasis in original). The Court called into question whether *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), is still good law and indicated that while it was prepared in the ordinary case to defer to the Commission's judgment concerning what policies would maximize the benefits of radio broadcasting to the public, it was not prepared to accept proposed format abandonments as ordinary cases.

II. *The Marketplace and Program Choices*

WEFM's challenge to the prevelant assumption about the effectiveness of the marketplace in satisfying the public's programming tastes and interests raises an issue of fundamental importance to the entire regulatory scheme. This is not an occasion for debating with the Court as to the economics of broadcasting. However, with all due respect, I think two points should be made in response to the Court's dicta on this issue.

The fact that in an advertiser-supported system the audience does not choose programming by *direct* market “votes” is simply not a decisive objection. The relevant and important question is whether programming reasonably corresponds to audience preference. I believe it does. Advertisers can scarcely be indifferent to listener choices. Rational advertisers will not buy time on stations that do not attract an audience, and a station does not attract an audience

unless it provides listeners with programming they want to hear. The incentives of rival stations to offer competitive programming alternatives in order to attract audience, in order to increase their attractiveness to advertisers, are not essentially different from those that would apply if stations sought support directly from listeners.

I agree with the common criticism that the present system is biased in favor of majoritarian interests and that those of the minority sometimes suffer in consequence. I assume this is the thrust of the Court's point about advertisers seeking to reach only those persons with desirable demographic characteristics ("demographics," in the slang of the trade). Demographics are not irrelevant to advertisers, but their influence should not be exaggerated. In any event, the economic logic that drives this tendency toward mass audience appeal is basically a function of the number of competitive outlets and the size of the market. See my dissenting opinion in *Prime Time Access Rule*, 50 FCC 2d 829, 889, 894 (1975); Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Quar. J. Econ. 194 (1952). By the same token, an entirely different system of marketing—such as a pay system—might well yield programming more responsive to minority tastes, as it would give people a better opportunity to express the intensity of their preferences and would avoid any advertiser bias. See my opinion in *Subscription TV Program Rules*, 52

FCC 2d 1, 72, 73 fn. 5 (1975); Minasian, *Television Pricing and the Theory of Public Goods*, 7 J. Law & Econ. 71 (1964). On the other hand, it is not at all clear that in the radio format change situations that are of concern to the Court, such a "pure market" system would yield results materially differing from those the present system produces. Would classical music aficionados pay more to hear broadcasts of their favorite programming than other, competing, listeners? (In considering this one would, of course, have to consider the widespread availability of tapes and disks.)³

We can, it seems to me, reasonably, even intelligently, guess that the existing system of program distribution is a satisfactory way to do the job, even though all segments of the "listening public" (as distinguished from the "purchasing public") may not be represented. Whatever may be the imperfections of the market in responding to viewer choice, the important, relevant question for us is whether administrative fiat is better. It has always been a centerpiece of broadcast policy that broadcasting is essentially a private enterprise albeit one that is

³ The Court ignores the availability of other, competitive sources of consumer satisfaction as these might bear on the public interest-diversity question. It is a serious mistake, however, to think about the uses of radio and television without also considering the context in which the electronic media are used. A part of the context relates to the uses of other media of information and entertainment. I would make more of this shortcoming if the Commission did not itself display it so frequently.

heavily regulated. As the Supreme Court stressed in *FCC v. Sanders Bros.*, 309 U.S. 470, 475 (1940), the Communications Act does not confer on the FCC "supervisory control of the programs, or business management or of policy." Though the Court in *WEFM* suggests that *Sanders Bros.* is an anachronism, I must respectfully but insistently reply that it is not, either as a matter of wise policy or as a matter of law. As to the latter, *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) seems to me dispositive.⁴ Whether *Sanders Bros.* still makes sense as normative social policy can be divided into two questions: first, as a practical matter, can the FCC effectively do what the Court seems to envision; second, what are the likely consequences—in particular what are the constitutional implications—of seeking to do so?

⁴ The Court's reliance in *WEFM* on *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953) and *Hawaiian Tele. Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974) for the contrary proposition seems to me most dubious; both cases dealt with public utilities for which the statutory scheme is fundamentally different in regard to the role of competition. It should, however, be noted that even in the field of public utility regulation increasing recognition has been given to the importance of competitive marketplace process. See *Washington Util. & Transp. Comm'n. v. FCC*, 513 F.2d 1142 (9th Cir., cert. denied sub nom., *National Ass'n of Reg. Util. Comm'rs v. United States*, 423 U.S. 836 (1975)). See generally, Posner, *Natural Monopoly and Its Regulation*, 21 *Stan. L. Rev.* 548 (1969).

III. *Formats, Uniqueness and Diversity*

At the outset it is important to appreciate how difficult it has been even to define the problem. That there is a general public interest in diversity I accept without much difficulty. This is part of the time-honored catechism which FCC Commissioners are expected to recite immediately after taking the oath of office. The difficulty comes, as usual, with trying to apply this commandment to concrete cases.

Of the numerous questions posed by the Court's mandate to preserve unique formats, the first and most basic is, what is a "format"—or more precisely, what is a particular station's format? Before one can know whether a unique format is being abandoned, it is necessary to know what the format is, and what makes it unique. The *WEFM* decision makes it clear that licensee labels are not controlling; the Commission is expected to make this determination for itself. For example, the *WEFM* opinion indicated that distinctions might have to be drawn within labeled formats—such as between 20th century "classical" music and classical music composed earlier. How is one to be certain, however, that the relevant format category is "classical"? And until we can answer that question, how shall we know when a change has occurred? Shall a station that bills itself as, say, a "fine arts" station be deemed to have

⁵ The Court in *WEFM* seemed in doubt whether "classical" and "fine arts" denoted the same format. 506 F.2d at 264. For present, illustrative, purposes, I equate them. In doing so, I remember Humpty-Dumpty's edict that words mean what we want them to mean.

altered its predominantly classical music format by playing Victor Herbert? One possible answer may be that Beverly Sills' rendition of a Victor Herbert tune is "fine arts" while Jeanette MacDonald, singing the same selection, is "easy listening" or "golden oldies." To be sure, no one expects the FCC to be concerned with occasional lapses of identity. As every dog gets at least one bite, so every station gets an occasional pass for deviations from the expected norm. But what is the expected norm? How many "bites" of John Philip Sousa do we permit a classical music station to take? ⁶

The Court of Appeals' reply to such questions, in its seminal decision in *Voice of Arts*, is devastating in its open abandonment of workable guidelines: "While an exact verbal definition may be somewhat elusive, this is perhaps a subject matter of which it can also be said that we at least 'know it when [we hear] it.' See *Jacobellis v. Ohio*, 378 U.S. 184, 197 . . . (Stewart, J. concurring)." 346 F.2d at 265, n. 1. With the greatest respect for Justice Stewart, I must protest that it is undesirable to annex yet more territory to the swamp of obscenity by transplanting his test for it into the present arena.⁷

⁶ What about syncopated Bach (the official title of the theme music is "Play Bach Jazz") which Washington lovers of classical music will recognize to be the theme music of the Renee Channey show on "fine arts" station WGMS?

⁷ One often overlooked fact concerning Justice Stewart's eye for obscenity in *Jacobellis* bears notice in this connection: he did not see it there, and he has not often seen it in subsequent cases either.

Nor is much light shed on the problem by the "public grumbling" standard, suggested in *Progressive Rock* and reiterated in *WEFM*. Insofar as this standard is seen to go not only to the "substantiality" that is requisite to place an issue in hearing, 47 U.S.C. Section 309(e), but beyond, to characterize the nature of the interest that the public has in diversity, it raises more problems than it solves. Clearly such problems go beyond radio: when CBS cancelled *Beacon Hill* and "public grumbling" was heard, was the FCC expected to rush forth to measure the decibels to determine if the grumbling was "of significant proportions"? And if the Commission found it to be such, then what?

All of these indications point in the direction of ensnaring us in what Alexander Bickel once described as the "web of subjectivity," but which, in this particular case, might more accurately and evocatively be called a Sargasso of idiosyncrasy. The standard for "uniqueness" or "diversity"—the diversity that the public wants enough so as to cause it to grumble when it is diminished—is obviously idiosyncratic and subjective. Quite aside from the constitutional objections (which I will address below) this subjective element presents intractable difficulties in administration. What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identi-

cal, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of middle-of-the-road formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would. Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" and that citizens' groups (and, alas, appellate judges) call format.⁸ It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved.⁹ At that thought the mind swims and the heart sinks.

Lest the foregoing rendition of legal conundrums be thought of as so much lawyers' fustian, I offer some real-world illustrations. Radio Station WGBH-FM, Boston, Massachusetts, whose application for renewal of its license is now under a petition to deny,

⁸ See, for example, the Appendix to this separate statement for a sustained illustration of the point.

⁹ It remains to be explored whether this procedural problem might not be handled by placing on a format change protestant the burden of showing that the proposed new format would not be unique as the format proposed to be discontinued. As a rule, it seems to me unfortunate to adjudicate substantive matters by the manipulation of procedural rules, but occasionally there is no other choice.

has, for the past 25 years, featured what may be described as a sort of highbrow "magazine" format. The major component of this format, to judge from the station's submissions,¹⁰ has been classical music, but with a substantial amount of jazz, non-Western music, poetry and drama, together with news, public affairs, literary readings and miscellaneous other selections. (Opposition to Petition to Deny, p. 2) Recently, the WGBH Educational Foundation (which is also the licensee of two educational TV stations) has allegedly been experiencing some financial difficulties, and, in response to this situation (and presumably others), the foundation apparently re-evaluated what the radio station ought to be doing. An internal memorandum to the station's staff prepared by WGBH Vice President Michael Rice in late November of 1974, has been submitted to the Commission by petitioners to deny, and sets out in some detail the views of management concerning the station's future.¹¹ A part of this evaluation required Mr. Rice critically to scrutinize the station's past performance and to discuss what its future ought to be like in light of changing listener attitudes toward radio. Mr. Rice observes:

¹⁰ These submissions are not all uncontroverted, and may well have to be sifted in a hearing. For the present purpose of illustrating the general problem, however, I shall accept these representations as true.

¹¹ For the present purpose, I assume without deciding that this memorandum is authentic: the licensee has not, in its pleadings, made objection on this point.

"... [I]n the days before television . . . radio schedules, like television's today, were fragmented into highly-varied, regularly scheduled daily and weekly shows . . . [;] people would search out the particular shows they wanted at particular times on particular stations. . . . [Today, the overwhelming number of persons] listen not to favorite particular programs, but to their favorite stations. These listeners favor a station when they know it can be counted on to offer a specific service they especially value *whenever* they tune it in. . . . It's my guess that the *consistency* in the specific kind of service a station offers is far more important to listener tune-in decisions than even the *quality* of the way that service is produced and presented. That sums up the present problem for us; much of what we do is of matchless quality, but altogether, it's bewilderingly inconsistent."

The memorandum goes on to argue that the mixed format is no longer a tenable way to run the station, and that, in order to flourish, WGBH-FM must have a more focused, narrowly-defined mission.

"Now, then, what should that mission be? If we deal from our strength, and we'd be foolish not to, the answer must involve music. From the day of that first Boston Symphony Orchestra broadcast over 23 years ago—through all of the different radio managers and program ventures that have come and gone—until today, nothing has so prominently, so distinctively identified WGBH Radio as our concert broadcasts and other musical programs. And for good reasons. From the beginning, we've been almost a part of music

performing and academic institutions of international rank. . . . I have no interest at all in the kind of service that might be described as classical juke-box. That might be lucrative in listener contributions. It would certainly be cheap to provide. But it would be cheap quality, too. Others might properly do it, but not WGBH. . . . Rather, the music programming that we provide must be infused by relative intelligence, an informed commitment to the *cause* of music in the life of human society. . . ."

On its face a seemingly praiseworthy goal. But, now, for the other side.

"On January 1, 1975, substantial and significant changes were made in the program service format of WGBH-FM, a non-commercial public radio station. . . . These changes were made unilaterally on the station's part without consultation or notification of the public whose donations and tax dollars support it. . . . In cancelling 90 percent of their jazz programming WGBH has effectively wiped out the most significant contribution the black man in America has made to the world of music."

Petition to Deny, filed by Committee for Community Access on March 3, 1975.

Few facts regarding the program appear to be controverted—there has, clearly, been a "format change," and this change has, clearly, de-emphasized (among other things) jazz music at the expense of classical music. There have evidently been public grumblings of significant proportions concerning

whether this change is in the public interest. How, assuming it wishes to perform its task exactly as required by law, should the Commission respond to this collision of values? If the Court means what *WEFM* says, there will apparently have to be a hearing. The controverted and unresolved "fact" concerns whether the former WGBH format was unique and whether the format change has diminished diversity or is otherwise inconsistent with the public interest. The fact that this is a renewal rather than an assignment is, of course, legally irrelevant. The Commission may not grant *any* application, whether for renewal or assignment, without first making a public interest finding—the very same finding in either case. Yet a hearing on an issue so ill-defined, as the Court must surely appreciate, could easily go on for weeks or months, costing in lawyers' fees a significant fraction of the station's entire annual budget.

One more illustration should suffice to make the point. In 1973, Kaiser Broadcasting Corp., licensee of WCAS, a small AM broadcast station in Cambridge, Massachusetts, attempted to assign the station to Family Stations, Inc., which proposed to change the WCAS format to highlight religious music and concerns. The WCAS format had been changed and adjusted several times during the 1960's; finally, the station settled on a format described as "folk-folk/rock," with which it stayed through several years. The assignment application was eventually granted, but, on petition for reconsideration, the

Commission was flooded with letters and petitions—public grumblings of significant proportions. Family attempted to establish that "folk-folk/rock" was not a unique format in the Boston market—that indeed two other stations regularly featured such music. In its *Amendment to Application for Assignment of License*, December 12, 1973, Family said:

"While the precise mixture [of music] may not be duplicated in toto on some other individual basis, every musical component can be found on one or more other stations in the Boston areas."

Replied the Committee for Community Access:

"It is quite simply an error in logical thinking to state that because the music presented on Format A is also part of Format B; then Format A equals or is available as Format B. This is a complete misstatement of musicological facts. One example that disproves the assertion is the simple fact that there is never loud, fast rock in the WCAS format while there is in those of WBCN and WNTN. This fact alone gives WCAS a unique sound which can never be offensive or jangling while any single hour on WNTN or WBCN can contain one or more decibel piercing, upbeat, rock or jazz selection."

Petition for Reconsideration, page 4. Or, as the Court of Appeals put it in *Progressive Rock*, "We deal here with format, not the occasional duplication of selections." 478 F.2d at 932.

This assignment application was dismissed just as our Broadcast Bureau was drafting a hearing order.

But, although the case died, the principle being contested lives on: radio listeners identify in radio formats idiosyncracies which are too fleeting to be caught in the clumsy nets of legal formulations. This difficulty clearly aggravates the already grave First Amendment problem. Even assuming some regulation of radio formats can pass constitutional scrutiny, to make concrete legal obligations turn on criteria (what is an "offensive sound?" what is a "jangling" sound? what is an "upbeat" sound?) which are so vague and so elusive that licensees cannot know what the law requires of them, seems to me a clear violation of due process, see, e.g., *Lauzetta v. New Jersey*, 306 U.S. 306 (1939) as well as unconstitutional infringement of free speech, see, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Cox v. Louisiana*, 379 U.S. 536 (1965). See generally, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).

It is possible to continue almost indefinitely describing ineffabilities. The existence of this legal swamp gas is only evidence of a marshiness in the underlying intellectual terrain: there is, I believe, no way for the Commission to allocate program formats in such a way as to maximize the welfare of radio listeners according to their own preferences. A simple illustrative model will make the point.

As noted in the Commission's opinion, there are upwards of 80 entertainment formats used by American radio stations, including Basque, Eskimo, Farm, Tagalog, Weather and Yugoslavian. Excluding those

with a small number of listed stations, there appear to be about a dozen principal formats. Trying to decide which stations ought to carry which formats in order to maximize the welfare of the community of radio listeners in a typical large market is a project too difficult to undertake for heuristic purposes.¹² Instead, to get a flavor for the character of the project, let us imagine a very small market, with only two available frequencies and three groups who are competing to get their preferred formats on the air. The three formats we are going to decide among are middle-of-the-road (MOR), country & western (C&W), and classical. One of the three group competitors has the following preference schedule among the above-mentioned formats:

1. middle-of-the-road
2. country & western
3. classical

The second group has a different preference schedule:

1. country & western
2. classical
3. middle-of-the-road

¹² It is not, of course, safe to assume that "diversity," "the public interest," and "community welfare" necessarily correspond to the same underlying value. The Court of Appeals takes the position that "diversity" and "the public interest" equate as a matter of law. It is easy, however, to imagine a situation where mandating "diversity" seriously undermines "community welfare" by requiring the carriage of formats for which there was no great public demand, with the attendant implicit opportunity costs associated with this action.

The third group feels like this:

1. classical
2. middle-of-the-road
3. country & western.

Let us assume that the members of each group are equally numerous, and that the preferences of each member of each group are entitled to exactly as much deference as the preferences of each other member of his own group and each member of each other group.¹³ Now, let us see if we can allocate formats "rationally." Suppose we decide that we will have classical and middle-of-the-road. That will be "fair," in one sense: each of these choices is the first choice of at least one of the three contending groups. But what about the country & western fans? Two-thirds of the audience prefers C&W to classical: to be fair, then, we ought to promote country & western over classical. So our two choices are MOR and C&W. But that is not fair either. Two-thirds of the audience prefers classical to middle-of-the-road: it is

¹³ For purposes of this exercise, another constraint should be mentioned—that the scarcity is genuine—that, in fact, there will be no "hybrid" formats and, accordingly, that some group will necessarily be disappointed. For the reasons advanced by Michael Rice, *supra*, there are very few hybrid radio program formats in radio today (using "formats" here in the broad sense of a consciously stylized type of programming). The Commission could, of course, mandate hybrid formats, and, in part, this may be the practical content of the format-diversity dispute. Whether this would increase community welfare, of course, is another question entirely. See fn. 12 *supra*.

only just, therefore, to replace MOR with classical, so that our two choices are classical and C&W.

But that is also wrong. Two-thirds of the audience prefers MOR to classical, so we ought to go back to where we started—with C&W and MOR.

Within the constraints of the model, I see no way to make allocations so as to maximize viewer satisfaction, and in the real world, which is much more complex than the model, "rational" allocation seems even more difficult. Cf., K. Arrow, *Social Choice and Individual Values* (1951).

But if our assumptions about the relationship between formats, licensees and the public interest have been beside the mark for all these years, as the *Voice of Arts* line of cases says, then it seems to me unthinkable that we should allow the consequences of that holding to fall asymmetrically on licensees who are seeking assignment authorization. Indeed, elementary considerations of fair play as well as constitutional principles of equal protection would seem to forbid the Commission from placing on any one licensee the full weight of the obligation to promote diversity without imposing an equivalent burden of obligation to the public interest in diversity on its competitors. Seen in this light, the Court's concern in *WEFM* about the financial status of the licensee proposing the change is irrelevant: the relevant question is not whether the station can sustain itself on its "unique" format but whether there is any basis for requiring *it* to do so rather than spreading the

presumed¹⁴ financial burden on all licensees. The answer to this question must be negative. In short, if the FCC's responsibilities to the public interest include the obligation to implement what the Court of Appeals has described as the "undoubted intention" of Congress that all major cultural groups be represented to the extent possible, I can see no escape from market-by-market allocation proceedings¹⁵

¹⁴ I presume the diversity obligation is a burden because it seems improbable that licensees would seek to trade "unique" formats for others that are less profitable. To the extent of that difference in profitability, the unique format is a "burden."

¹⁵ There are a number of ways the Commission could apportion the diversity obligations of licensees in a particular market, but all of them would have at least one administrative chore connected with them—the necessity of the Commission ascertaining what the public interest required by way of format diversity in each market or at least the 100 or so largest markets. Undoubtedly, we would find that the demand for, say, eastern European language broadcasting was greater in Pittsburgh and Cleveland than in Phoenix and Atlanta, and that all-news programming was much more in demand in Washington, D.C. than in Walla Walla, Washington; but how we should apportion the obligation to carry a certain amount of twentieth century classical music, other classical music, progressive rock music, country & western music, non-western music, non-music, and all the other possible formats is a matter that would have to be studied in great detail at a later date.

One way the diversity obligation could be pursued, of course, would be to make all station formats essentially hybrids. A 24-hour class-B station, for example, could be required to carry 50 percent classical music and 50 percent soul music. Norms would obviously have to be evolved, however, to prevent the station management from relegating one or the other format to undesirable hours; probably, the most

which would determine what array of formats a particular community required, together with which station would be allowed to use which format. With all its evils, this system clearly would be fairer than the one we have now (under the *Voice of Arts-Progressive Rock-WEFM* mandate) which, like Browning's Caliban on Setebos, lets "twenty pass and stone[s] the twenty-first/Loving not, hating not, just choosing so." That it would require us to take stock in what Judge Leventhal has characterized as "the evils of communications controlled by a nerve center of government," *National Broadcasting Co., Inc. v. FCC*, 516 F.2d 1101, 1133 (D.C. Cir. 1974), is simply one of the costs that would have to be endured.

IV. Constitutional Dimensions of Format Regulation

I assume without discussion that the First Amendment protects entertainment programs, see, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *WEFM*, 506 F.2d 246, 261, 271, n.9 (Bazelon, C.J., concurring), even those which apparently lack redeeming literary, artistic (musical) or social value. Freedom of speech in broadcasting differs considerably, of course, from freedom of speech

equitable system would require that different formats alternate hours or days throughout the license term. No matter what approach were adopted, however, there is no escaping the magnitude of the administrative burden, nor the great amount of government stultification of private speech that would evolve from a faithful pursuit of the Court of Appeals' current mandate.

conventionally considered. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 262 (1974) with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).¹⁶ Accordingly, the blackletter rule that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972), may not apply with full force to broadcasting but rather may be counterbalanced to a degree by the notion that nothing in the First Amendment prevents a licensee from being required "to share his frequency with others and to conduct himself as a proxy or fiduciary" for his community. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 389. At the same time, however, no court has gone so far as to authorize the Commission to forbid a broadcaster to carry a particular program (see 395 U.S. at 396) or to dictate to licensees "what they may broadcast or what they may not broadcast." *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 480 (2d Cir. 1971). Whatever it is that makes broadcast communications "special," however, cannot make irrelevant the concern that government not become too deeply involved in the content choice of essentially private communications concerns. The First Amendment cannot merely mean that government should

¹⁶ For extensive elaboration of this point, Chief Judge Bazelon's concurring opinion in *WEFM* offers an impressive place to begin. In earlier days, I explored the whole subject in *The FCC and the First Amendment: Observations on Forty Years of Radio and Television Regulation*, 52 Minn. L. Rev. 67 (1967).

refrain from "bad" interventions in speech: if it is to have any vitality at all, the constitution must constrain—it must especially constrain—well-intended interventions also. As Mr. Justice Brandeis memorably put it: "Experience should teach us to be most on our guard to protect liberty when the government's purposes are benificent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928).¹⁷ But if we go forward with the *Voice of Arts* version of the public interest, we shall obviously have to interrupt that tradition, for the obligation to carry one format necessarily entails the obligation to refrain from presenting another. It may be, at the center, that a middle-of-the-road format can safely play any sort of music, so long as it does not specialize: but for a progressive rock format to dally with Mozart or a classical format with the Beatles would clearly have to be a sort of civil *malum prohibitum*, for which our rules and regulations would have to prescribe a remedy. If the Commission is to pursue this route, of course, it will have "to oversee far more of the

¹⁷ Equally apt is the warning of Laocoon at the stage of Troy when the Greeks offered their celebrated horse as a peace offering: "I fear the Greeks even when bearing gifts." Laocoon was, of course, strangled by serpents for his efforts. I shall apparently meet a more comfortable fate, because, even if I should be discomfited in this effort to dislodge what I believe an unjust and unwise rule of law, at least I shall be able to soothe myself in defeat with the classical music of my favorite composers.

day-to-day operations of broadcasters' conduct" than even would have been the case with mandatory access editorial advertising, a reason of apparently constitutional stature in the Supreme Court's holding in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 126 (1973).

The constitutional issue here is clear enough, and need not be labored. The point which requires emphasis is that we are not here concerned with the conventional slippery slope, the line-drawing problem of the sort that clutters the legal landscape and fills the days of lawyers on both sides of the bench. For, if we are to avoid the unthinkable choices of, (1) ignoring the Court's mandate entirely or, (2) allowing the full weight of its doctrine capriciously and differentially to fall on an occasional applicant, we shall have to pitch ourselves headfirst off of the slippery slope into the hitherto untrespassed-upon valley of comprehensive control.¹⁸ In candor it should be

¹⁸ An intermediate possibility, of making such judgments only when faced with a comparative choice between two applicants, is suggested in Chief Judge Bazelon's concurring opinion in *WEFM*. This route would, in my view, be preferable to that of the Court. But not even Judge Bazelon's approach resolves the tenacious practical difficulties that belong to making objective administrative judgments in this area. Hence, this approach does not eliminate, although it does ameliorate, the First Amendment objections. It is not enough, I think, simply to note the necessity of choice under conditions of scarcity. "Scarcity" is a relative (and subjective) term, subordinate in the overall table of constitutional values to many other interests. "Scarcity" may thrust upon us certain necessitous matters we would rather avoid; but

acknowledged that the Commission does not plead the First Amendment with hands that are altogether clean. In view of its efforts in other areas to regulate broadcast programming, directly or indirectly, some critics will no doubt view its defense of free speech here as coming with poor grace. Poor grace or not, it comes with good sense and good sense is not to be despised for lack of precedent. Perhaps the Commission would have greater credibility had it always stood firm for righteous principle, but I hope we have not forfeited our standing to assert a position consistent with our most fundamental and valuable principles. Considering the deferential respect paid even to the most fanatical and unpopular views of private persons pleading the First Amendment in their own self-interest, see, *e.g.*, *Redrup v. New York*, 386 U.S. 767 (1967), it would be an anomaly—would indeed be a crushing defeat for liberty—if the government itself could not plead the constitution without embarrassment and apology.

it is hardly permission to run rough-shod over free speech interests. Harry Kalven expressed the point exactly:

"The traditions of the First Amendment do not evaporate because there is licensing. We have been beginning, so-to-speak, in the wrong corner. The question is not what does the need for licensing permit the Commission to do in the public interest. Rather, it is what does the mandate of the First Amendment inhibit the Commission from doing even though it is to license."

Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. of L. & Econ. 15, 37 (1967).

APPENDIX

Memorandum of Terry P. Hourigan, Program Manager, to the staff of WMAL-FM, Washington, D.C., reproduced from R. Hilliard, *Radio Broadcasting* 119-122 (1974).

Basic Objective

WMAL-FM has as its basic programming objective the achievement of the largest 18 to 34 year-old audience in the Metropolitan Washington area. This will, in turn, allow us to accomplish two essential goals: making our station a dominant force on the FM band and increasing our contribution as a profit center in the Evening Star Broadcasting Company.

We approach this task with a very positive outlook. The timing is right, the goal is realistic and our approach is sound. Our plan of attack centers around the market key to this 18 to 34 year old audience, the 25 year old, highly educated young professional. He or she is our specific target. If we can attract the 25 year old we have zeroed in on the person of highest influence in our demographic group. Persons on the younger end of the spectrum all wish to be thought of as being "really adult," while many of those over that age are clinging to the "with it" image of the younger man or woman.

These people all coalesce in their radio listening desires. Brought up on a steady diet of top-40 and hard rock music, they have grown accustomed to its rapid pace and brevity of expression, but have been educated past the point of being able to accept the

banality of top-40 or the non-musical noise of hard rock radio. There exists, therefore, a potentially huge market of untapped listeners waiting to be claimed—waiting for a station or sound they can call their own. The station is WMAL-FM. The sound is "*The Soft Explosion*." What follows is our game plan.

The Market

Washington, D.C. is a community dominated by relatively affluent young professionals. The metropolitan area is experiencing an explosive growth in population. Rapidly expanding Federal Government facilities continue to attract highly educated younger families to move into expensive homes in the metro area where an extremely high percentage of the more affluent families are located. The following facts make Washington unique among the nation's 10 largest cities. Washington metro area has an average median age of 24.1 years, with 34.7% of the population under 18 years of age and only 6.0% over age 64—youngest by far in the country.

The average household income is \$12,477 annually, the *largest* in the United States:

- Washington ranks #1 in household income.
- Washington ranks #1 in population increase.
- Washington ranks #3 in value of homes.
- Washington ranks #2 in annual purchase of FM sets.
- Washington has 431,300 metro area men 18-34.
- Washington has 468,800 metro area women 18-34
- Washington is the nation's youngest, fastest growing market.

Personalities

Our on-the-air personalities are now, and will continue to be, aware of the unique opportunity they have to help mold the thinking and tastes of the 18 to 34 year old audience, and of the corresponding burden of responsibility this entails. They have uppermost in their minds the thought of projecting a positive, warm image—the thought that the station cares very much that the listener has chosen to listen to us. We feel, as broadcaster Chuck Blore said, “If you’re programming a radio station and someone tunes into your frequency, they’ve given you everything they have to offer, their ears and their minds. And if you’re *programming* that radio station, you have to give them something in return, and we try to give them reward after reward after reward for tuning to our place on the dial.”

We believe our personalities can do just that. Their job is to communicate with the audience, to project the image that they are happy in their work, that it is truly pleasurable to present our programming, that the listener deserves the very best we have to offer and that the very best is exactly what he or she is getting.

Music

A most essential ingredient in programming for the 18-24 listener is music. While very careful control must be exercised over the selection and presentation of music, it must not sound too structured. Our morning show has been used for the past four months as a

testing place, a proving ground for our new music mix. It has proven successful beyond our fondest hopes. Our audience growth in this period of tightened programming control has been 60% over the last two rating books, and our demographics almost entirely 18-34. The music formula has been devised for simplicity of implementation. This simplicity adds to our control, making more effective our ability to hold control of our music in the face of changing audience tastes. In effect, it makes us “fad-proof.”

We play a mix composed of three ingredients:

1. *Contemporary Hits*. Those of the current contemporary best-sellers which fall within the parameters of the taste of our 25 year old; no “bubble gum,” no non-musical noise, only good solid hits, songs which have achieved mass favor with young-adult listeners.

2. *New Album Cuts*. These songs are selected by our music director as the best efforts of the best contemporary artists, only the best one or two tracks in the best of the new albums. (This keeps us ahead of the “hit” game. In recent years the former music industry trend has been reversed and today albums are released months ahead of the singles.)

3. *FM Oldies*. These are simply hits by groups which have become the “standards” of modern rock music. Included are people like The Beatles, The Byrds, Blood, Sweat & Tears, Carole King, etc. These are chosen carefully and mixed for best maximum effect.

These three ingredients, carefully selected, imaginatively showcased, are the entirety of our music

formula. Nothing gets on the air which has not met these established criteria.

News and Public Affairs

1973 will be a year of departure from the previously accepted standard of formal, "structured" newscasts. Our air personalities will integrate news items, with particular emphasis given to the local news, throughout the entire hour. There will be no "aside" comments by the announcers, no personal opinions about the news stories, just a good, brief, positive delivery of information, as smoothly integrated into the overall program flow as a commercial.

WMAL-FM will continue its effort to broadcast programs in the public interest, but they must take a new form. The line uppermost in our minds must be "*Eliminate Turnoffs.*" We feel a line of demarcation must be drawn between informing and educating the listener, and boring him or her. "Mini-specials" will be the order of the day, with all our personalities brought into the effort. These mini-specials will always be attempting to accomplish something positive—getting our audience personally involved in the areas we explore. Ours is the most socially-conscious audience in the history of radio and we would not be living up to our responsibility as broadcasters if we failed to stimulate this force to the best of our ability.

Public Service and Special Programming

Our increased commercial success has not lessened our commitment in the area of public service. We

retain on our staff the position of public service director and have a continual dialog with a wide number of community groups and interests, resulting in their knowledge that WMAL-FM knows their problems and is ready to give almost instant help in informing the community. We have also undertaken major campaigns designed to help combat drug abuse, fight the growing VD epidemic and inform the public about sickle cell disease. We have participated in three-station campaigns on behalf of the United Givers Fund, The Black United Fund and the Salvation Army.

Washington Redskins. WMAL-FM is the Redskins station on FM. Our involvement with and promotion of the Skins great championship drive, our daily talk shows with Jerry Smith, daily conversations on the air with Steve Gilmartin. "The Voice of the Redskins," have made us the leading FM sports station in Washington.

In Concert. Our broadcasts of these 90-minute rock specials, simulcast with WMAL-TV, has created an enormous audience for late night weekend programming. The acceptance by our audience of this, the most innovative new idea in entertainment programming in recent years, has opened the way for alternate week specials as well. The Music Festival, with John Lyon, is a locally produced 90-minute rock special featuring major artists recorded in concert settings.

Other Specials. *Black Gold* ran in April, 1973, as a 12-hour special featuring the greatest black musicians in pop music of the past 20 years. A coopera-

tive venture informing the public about Howard University's Center for Sickle Cell Disease research, *Black Gold* was underwritten by Safeway Foods. *Beatles '72* was a five hour concert exploring the influence in music and life style of the most dominant force in the history of rock music. *Tommy* was a specially showcased presentation of the rock opera.

APPENDIX D

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 20682

IN THE MATTER OF
DEVELOPMENT OF POLICY RE: CHANGES IN THE
ENTERTAINMENT FORMATS OF BROADCAST STATIONS

MEMORANDUM OPINION AND ORDER

(Adopted: July 28, 1976;

Released: July 30, 1976)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENT-
ING AND ISSUING A STATEMENT; COMMISSIONER
ROBINSON ISSUING A SEPARATE STATEMENT.

1. The Commission has before it for consideration its *Notice of Inquiry* in Docket No. 20682, 41 Fed. Reg. 2859, 57 FCC 2d 580 (1976), concerning its policies and practices with respect to changes in the entertainment formats of broadcast stations. Also before the Commission for its consideration are the various comments and reply comments filed in response to the *Notice of Inquiry*. These comments are summarized in Appendix A.

2. This *Inquiry* grows out of the opinion of the Court of Appeals, *en banc*, in *Citizens Committee to Save WEFM, Inc. v. FCC*, 506 F.2d 246 (D.C. Cir.

1974), the latest in a line of cases¹ which hold that when an application for the sale of a radio station license is before the Commission, and in connection with that sale the purchaser intends to discontinue the station's existing entertainment format, if there has been expressed a significant amount of public protest to the effect that this change of format, if completed, would deprive the public of an entertainment format not otherwise available in the market, then the Commission must hold a hearing pursuant to Section 309 of the Communications Act, as amended, to determine whether the public interest would be served by a grant of the application. The Commission issued the *Notice* in this Docket to solicit public comments on the nature of the obligations imposed by these cases and whether the Commission could proceed to implement those obligations harmoniously with the Communications Act and the Constitution.²

¹ *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Hartford Communications Committee v. FCC*, 467 F.2d 408 (D.C. Cir. 1972); *Citizens Committee to Preserve the Present Programming of WONO(FM) v. FCC*, No. 71-1336 (D.C. Cir.) (Order, May 13, 1971); *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-FM) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970).

² Several of the commenting parties, in addition to responding to the merits of this *Inquiry*, questioned the propriety if not the legality of conducting this proceeding at all. In the opinion of these parties, the opinion of the United States Court of Appeals in *Citizens Committee to Save WEFM, Inc. v. Federal Communications Commission*, 506 F.2d 246 (D.C. Cir. 1974), decides as a matter of law what policies may be

3. We believe this important question must be examined within the framework of our basic legislative mandate. The Communications Act makes a fundamental distinction between common carrier and broadcast regulation, and, as the Court of Appeals has recognized, there is a degree of mutual exclusivity between them. See, *Hawaiian Telephone v. FCC*, 498 F.2d 771 (D.C. Cir. 1974); *Cf. Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380 (1975). Before the Communications Act was adopted, Congress debated carefully whether and to what extent the obligation of common carriage ought to be imposed on radio broadcast licensees.³ It concluded, in the end, that the domains of radio broadcasting and common carriage ought to be kept distinct, and it enacted Section 3(h) of the statute to express this conclusion. Section 3(h) reads: "'Common carrier' or 'carrier' means any person who is engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy . . .; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

pursued by this agency when a radio station seeks to modify an entertainment format despite wide-spread listener opposition to the proposed change. We reject this contention, for the reasons set forth in our Memorandum Opinion and Order of March 9, 1976, 58 FCC 2d 617 (1976).

³ This background is set out in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103-109 (1973).

4. Thus the Congress intentionally refrained from extending the full range of regulatory tools deemed appropriate for common carrier regulation to the field of broadcast regulation. While the Communications Act of 1934 created a public right to have access to any common carrier “. . . communications service upon reasonable request . . .,” 47 U.S.C. 201(a), Congress expressly rejected proposals to establish an analogous public right to access to the broadcast airways. Similarly, while the Act requires that common carriers receive Commission authority to commence or discontinue communications services, 47 U.S.C. 214, Congress did not enact an analogous requirement that broadcasters receive Commission authority to commence or discontinue programming, including program format services, offered to the public.

5. Notwithstanding this manifestation of Congressional intent, the Court of Appeals has in recent years attempted to impose various common carrier-like obligations on broadcast licensees, either by reading the Constitution to require it, or by interpreting the “public interest” language of the Communications Act to contain it. In *Business Executives Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), the Court held that a broadcast licensee’s policy of refusing to accept any paid announcements concerning controversial matters of public importance violated both the public interest mandate of the Communications Act and the First Amendment. The Court rejected the proposition that the policies of broadcasters, as essentially private businesses, did

not engage the obligators of “state action,” and held that, since the station opened its doors to ordinary commercial messages, it could not be heard to assert that advertising, *per se*, was inherently disruptive of the proper functioning of the station. Having found the broadcasters’ conduct to be constrained by the policies of the First Amendment, the Court of Appeals went on to hold that “The content of the idea which the excluded speakers wish to promote is—emphatically—not permitted as a distinguishing factor in itself.” 450 F.2d at 660 (emphasis in original).

6. The Supreme Court, in reversing this decision, took account of Congress’ manifest “desire to preserve values of private journalism under a regulatory scheme which would insure fulfillment of certain public obligations,” *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 109 (1973), and noted that “The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claim under the umbrella of the First Amendment.” 412 U.S. at 103.

7. The format change cases are closely related to the access issue presented in the *CBS* case. At issue in each situation is basically a conflict between the Commission and the Court of Appeals concerning the appropriate way to implement the policies of Congress under the Communications Act. As in the *CBS* case, the Court of Appeals here has sought to impose a common-carrier like obligation on radio broadcasters pursuant to its understanding of the public in-

terest language—in this case, Section 309—of the Communications Act. In *Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F.2d 204, 214 (D.C. Cir. 1960), the Court of Appeals observed that a common carrier has “a special legal status and obligations. . . This includes an obligation, deeply embedded in law, to continue service.” The Court of Appeals went on to note that abandonment of service could not be lightly granted: if the carrier “Wants to abandon service because it must now share [the] market, or because it prefers to use that gas for more profitable unregulated sales, or because it wants to be rid of what it considers a vexatious servitude, these are not reasons for granting its request. Abandonment may be allowed only if the ‘public convenience or necessity’ permit.”

8. In contradistinction to the “obligation, deeply embedded in law, to continue service” which common carriers must bear, the Communicationse Act “recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition.” *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940). The Court goes on to explain:

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

The implication of this holding for entertainment formats is not open to doubt: broadcasters are to compete with one another, and they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take. It was through this regime of competition that Congress “aim[ed] . . . to secure the maximum benefits of radio to all the people of the United States,” *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943).⁴ The Court of Appeals all but concedes the inconsistency of its views with those expressed by the Supreme Court in *Sanders Brothers* by suggesting that more recent cases, such as *FCC v. RCA Communications Inc.*, 346 U.S. 86 (1953), or *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776-777 (D.C. Cir. 1974), have placed in doubt the notion that competition was indeed Congress’ plan for the broadcast industry under the Communications Act. But neither of these cases concerned the broadcasting industry. On the contrary, these are common carrier cases, whose relevance to the holding in *Sanders Brothers* is open to very serious question.

⁴ The *NBC* case upheld the Commission’s Chain Broadcasting regulations, the first in a series of regulatory efforts to preserve licensee discretion over program material and foster competition in local markets. In upholding the Prime Time Access Rule, a direct descendant of the Chain Broadcasting Rules, the Second Circuit noted: “It is clear that the Nation’s policy favoring competition is one which the FCC must incorporate in regulating the broadcast media.” *National Association of Independent Television Producers and Distributors v. FCC*, 502 F.2d 249, 256 (2d Cir. 1974).

9. The record in this Docket bears out the factual correctness of the underlying legislative assumption of competition to which the Supreme Court in *Sanders Brothers* refers. The Commission's study of program diversity in major markets, whose findings are summarized in Appendix B, decisively shows how effective the tool of competition has been in carrying out Congress' plan for entertainment programming. We find that reliance on this tool will produce program diversity of a sort, and in a form, that equates both to the welfare of radio listeners and to the public interest generally. In addition, there exist practical considerations with constitutional overtones which supplement the issues of statutory interpretation in bringing us to the conclusion that we must refrain from the detailed supervision of entertainment formats which the Court of Appeals holds to be a part of the Commission's statutory responsibilities. These considerations are explained more fully herein.

10. The *WEFM* decision has far-reaching ramifications for our entire scheme of radio broadcast licensing. Although this case, like the other entertainment format cases which the Court of Appeals has seen, arose in the context of an application for assignment, Section 309 deals not merely with transfers, but, more broadly, with all written applications which it is the Commission's duty to grant or deny under Title III of the Act. The public interest finding that the Commission is required to make before granting an assignment application is in no respect different from the public interest finding that must be

made before a renewal application may be granted; accordingly, nothing which the Commission is obliged to do in order to find that the public interest would be served by the grant of an assignment may properly be omitted in the much more common situation of an application for renewal.

11. The Commission's long and continuing reluctance to define and enforce the "public interest" in entertainment format preservation is based both on practical considerations and on our understanding of the structure and meaning of the Communications Act. The practical problems are simple to comprehend. To determine, in the context of a prospective format change, whether the public interest would be served by allowing it, we must ascertain: (1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; (3) if there are not, whether the benefits accruing to the public from the format change outweigh the public detriment which the format abandonment would entail. Moreover, where a prospective purchaser alleged that its proposed new format would add as much program diversity to the communities in its service area as the abandonment of the old format would subtract, evidence would have to be heard on this issue as well.

12. In the renewal context, the Commission anticipates that the usual format abandonment protest would concern a *fait accompli*, i.e., would involve a complaint that a licensee, with an obligation to operate his station in the public interest, had deprived

its service areas of a unique format during the previous license term, for which, accordingly, a sanction would in principle lie. The Commission could then well be obliged to designate a hearing on the renewal similar to that described in paragraph 11, *supra*, but more complex also, because it might include the question whether a format change had in fact actually occurred.

13. This last question presents an acute practical problem stressed in a number of the comments. How is the Commission to define what constitutes a particular entertainment format, and what demarks it from neighboring formats? The Court of Appeals has made it clear that it, for one, will not be satisfied by any Commission attempt to define formats broadly. Hence, "popular music" is not a sufficiently diacritical category to meet the Court of Appeals' conception of our public interest mandate; nor even, we infer, would be "rock music" or "classical music." Instead, the Commission is required to distinguish progressive rock music from the other species of the rock genre, *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); likewise, as the Court of Appeals suggests in the *WEFM* opinion, we may be obliged to distinguish between 19th Century and 20th Century classical music, 506 F.2d at 264 n.28, and to make, in the context of an application for renewal, very real consequences turn on such distinctions.

14. In practical terms, "format" means program material. As Commissioner Robinson has put it:

"What makes one format unique makes all formats unique. . . . Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's 'sound' and that citizens' groups (and alas, appellate judges) call format." 57 FCC 2d 580, 594, 595 (1976) (concurring statement).

15. The elusiveness of a format's definition has a practical consequence in addition to a vagueness that makes it impossible for a broadcaster to know prospectively what sort of entertainment programming the public interest standard requires it to present. The same uncertainty that plagues the licensee's decisionmaking in the first instance will plague our review of the licensee's discretion. The Commission does not know, as a matter of indwelling administrative expertise, whether a particular format is "unique" or, indeed, assuming that it is, whether it has been deviated from by a licensee. Furthermore, we have not been afforded any degree of latitude in summarily deciding whether the station's finances are probative of an untenable format, even assuming it to be unique.⁵ Accordingly, the Commission would

⁵ In *WEFM* the Court was careful to note that the relevant financial inquiry was not whether the station *had been* financially profitable during the tenure of a particular format, because financial losses could proceed from a variety of causes (argued the Court) completely unrelated to the station's program menu. Rather, the relevant inquiry is whether the format *might have been* viable, 506 F.2d at 265-66. This is, we observe, an almost fantastically speculative point for inquiry, and one not subject to very satisfactory—and certainly not to incontestable—proof.

be obliged in the typical case to hold a hearing on renewal.

16. The evidence on this record supports the conclusion that the marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (*i.e.*, promoting the greatest diversity of listening choices for the public) or in economic terms (*i.e.*, maximizing the welfare of consumers of radio programs). The market allocation method is not, however, perfect. See Appendix B. We recognize that the market for radio advertisers is not a completely faithful mirror of the listening preferences of the public at large. But we are not required to measure any system of allocation against the standard of perfection; we find on the basis of the record before us that it is the best available means of producing the diversity to which the public is entitled. Appendix 2 of the filing of the National Association of Broadcasters, a description for the advertising trade of the radio stations in the New York and Washington, D.C. markets, shows that in large markets, with many aural services and intense competition, there appears an almost bewildering array of diversity. In New York, the menu includes all-news, classical music, rhythm and blues, Jewish ethnic, Greek ethnic, Spanish, country, modern country, country and gospel, talk, easy listening, middle of the road, show tunes, beautiful music, popular standard, and one which calls itself "mellow." How these various program themes differ from one another, and how each is faith-

ful to its own conception, are questions we need not reach to observe the variety of choices available to radio listeners in the New York market.

17. Format allocation by market forces rather than by fiat has another advantage as well. It enables consumers to give a rough expression of whether their preference for diversity *within* a given format outweighs the desire for diversity *among different* formats. As Commissioner Robinson has observed, "with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of . . . formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would." 57 F.C.C. 580, 594-595 (1976).

18. A recent staff study of audience ratings for major market radio stations lends further credence to this observation. The results of that investigation indicate that audience ratings for major market radio stations tend to differ nearly as much for stations programming similar types of music (*e.g.*, middle of the road) as they do for stations programming markedly different types (*e.g.*, progressive rock as opposed to classical). This finding strongly indicates that audiences carefully discriminate in selecting stations. Given this situation, Professor Bruce Owen of Stanford University has demonstrated that maximization

of format diversity will not necessarily lead to increased listener satisfaction.⁶ Indeed, Professor Owen shows that efforts to maximize format diversity through regulatory fiat could very well result in a *diminution* of consumer welfare: a format protected under the *WEFM* rationale may be of lesser value than the format which the broadcaster proposes to substitute. There is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format. It is impossible to determine whether consumers would be better off with an entirely new format without reference to the actual preferences of real people. In these circumstances, there is no reason to believe that government mandated restrictions on format changes would promote the welfare of the listening public. Indeed, in view of the administrative costs involved in such a program of regulation, and in view of the chilling effect such regulations would doubtlessly have on program innovation, there is every reason to believe that government supervision of formats would be injurious to the public interest. The record in this proceeding clearly points to the conclusion that such a program of regulation would not be compatible with our statutory duty to promote the public convenience, interest and necessity, and we so find.

⁶ See Comments of National Association of Broadcasters, Appendix 1.

19. Finally, allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate. In our society, public tastes are subject to rapid change. The people are entitled to expect that the broadcast industry will respond to these changing tastes—and the changing needs and aspirations which they mirror—without having to endure the delay and inconvenience that would be inevitable if permission to change had to be sought from a government agency,⁷ particularly after a full-scale evidentiary hearing. In this respect, it may not be widely appreciated what, precisely, is entailed in a hearing of the sort contemplated by Section 309 of our statute. It is not a brief or summary affair, but large-scale litigation which imposes enormous costs on the participants and the Commission alike. We do not know with any certainty the magnitude of the burdens imposed on broadcast licensees by hearing procedures of the sort contemplated by the Court of Appeals in *WEFM*, but it may be instructive to consider the costs to the Commission of the *WEFM* case, hearings on which have been proceeding pursuant to the Court's mandate on remand. The *WEFM* hearings may be considered fairly typical of format abandonment hearings; the administrative law judge is

⁷ *National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1133 (D.C. Cir. 1974) (opinion of Leventhal, J.), *vacated*, 516 F.2d 1180 (D.C. Cir. 1975, *cert. denied sub nom. Accuracy in Media, Inc. v. National Broadcasting Co.*, 96 S. Ct. 1105 (1976)).

required to consider, basically, the issues mentioned in paragraph 11, *supra*, as well as a financial issue (see footnote 3, *supra*) and a misrepresentation issue. The ordinary case would generally be similar in complexity. And in this case, an administrative law judge held two pre-hearing conferences in Washington, D.C.; his preparation time was an additional eight hours. In addition, the Broadcast Bureau trial staff spent above two hundred man-hours of preparation time. Subsequently, hearings were held on nine separate dates in Washington, D.C., and on nine different dates in Chicago, from which a transcript of 3120 pages was compiled. Following the hearings, the Broadcast Bureau spent two hundred and forty hours preparing proposed findings of fact and the administrative law judge will have spent approximately two hundred and eighty hours preparing his initial decision. As Chairman Wiley has observed, "[e]ven after all relevant facts have been fully explored in an evidentiary hearing, we would have no assurance that a decision finally reached by our agency would contribute more to listener satisfaction than the result favored by station management." 57 FCC 2d 580, 586 (1976).

20. These costs, and the uncertainties that impose them, have a constitutional dimension as well. Under the threat of a hearing that could cost tens or hundreds of thousand of dollars, many licensees might consider the risks of undertaking innovative or novel programming altogether unacceptable. Several commenting parties mentioned this effect, and we regard

it as of great importance. The existence of the obligation to continue service, we find, inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms.

21. The administrative process "combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a 'partnership' in furtherance of the public interest, and are collaborative instrumentalities of justice." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970). When such "partners" come to a point of fundamental disagreement, it is incumbent upon us to take a step back and rethink our entire position if this relationship is to be creative rather than destructive. This Docket is the occasion for the Commission to reconsider its policy on entertainment formats. We view the matter as one with very serious implications for the structure of the broadcasting industry, the administration of the Communications Act, and the meaning of the First Amendment. Our reflection, aided by extensive public comment on virtually every aspect of this matter, has fortified our conviction that our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion. Also, this entanglement would

certainly result from the Commission placing restrictions on the entertainment programming that a broadcaster could offer, because "a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed." *Lemon v. Kurtzman*, 401 U.S. 602, 619-20 (1971). See also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 126-27 (1973). Any such regulatory scheme would be flatly inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximizing the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming.* We are, of course, cognizant of our responsibility to implement the Court's mandate in the *WEFM* decision, 47 U.S.C. 403(h), and to that end a hearing on the *WEFM* assignment has been substantially completed. See Docket 20581, 40 F.R. 39549 (1975). Thus our

* The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 FCC 2d at 231. Having given the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor necessary in the public interest. Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats, and that Commission supervision in this area will not be conducive either to producing program diversity nor satisfied radio listeners.

statement here should not be viewed as a prejudgment of that proceeding, but rather as an expression of what, upon further serious reflection, we view to be an extremely unwise policy in which we and the Court have both become entangled. To emphasize our concern that the views we have set forth here will not be misinterpreted, the implementation of our new policy will be stayed for sixty days, and, if a petition for review is filed, until judicial review of this Order has been completed.

22. For the foregoing reasons, IT IS ORDERED, That the policy set forth above IS ADOPTED effective 60 days from the release date of this Order or, if any party seeks judicial review of this Order, upon final disposition of any such review proceeding. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

APPENDIX A

SUMMARY OF COMMENTS

1. The Commission received a variety of comments in response to its *Notice of Inquiry in Docket 20682* from both broadcasters and several citizen and public interest groups, students and other interested parties.¹ Not surprisingly, given the background of this proceeding, all broadcasters' comments were criti-

¹ A list of parties filing comments is appended to this summary.

cal of any attempt by the Commission to regulate the content of broadcast entertainment programming, while citizen and public interest group comments solidly favored Commission intervention in station entertainment format selection. The comments of other interested parties were divided on the question. The arguments for and against Commission regulation of broadcast station entertainment formats centered generally around the Commission's authority and responsibility under the First Amendment, and the statutory guidelines and dictates of the Communications Act of 1934, as amended. This breakdown corresponds to the two important questions we raised in the *Notice* and the comments may appropriately be discussed in terms of these two considerations.

The Constitution

2. Critics and supporters of Commission regulation of entertainment formats agree that the First Amendment applies to broadcasting, *Associated Press v. United States*, 326 U.S. 1 (1944); *United States v. Paramount Pictures*, 334 U.S. 131 (1948), and that entertainment and music are included within the basic First Amendment protections, *Winters v. New York*, 333 U.S. 507 (1948). This, however, is the extent of agreement. Those who urge Commission regulation of entertainment formats on First Amendment grounds cite the following language in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (*Red Lion*), as primary support for that position:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. *Red Lion, supra*, 395 U.S. at 390.

The National Organization of Women (NOW), who filed the most comprehensive constitutional argument in favor of regulation, states that this holding encompasses five existing elements within the fundamental First Amendment rights of listeners, to wit: (1) the right to receive ideas and information, (2) the right to diverse and antagonistic ideas, (3) the right of minority audiences to be protected by the FCC, (4) the right to be free from monopolistic domination of information sources, and (5) the right to pick and choose from competing entertainment formats and viewpoints. NOW believes that the public has a compelling First Amendment right to hear programming at its first preference level and that broadcasters' "somewhat undefined First Amendment right" are subservient to the above enumerated rights of listeners.

3. Opponents of Commission format regulation argue that the American system of broadcasting has, from the beginning, been founded on the principle

that decisions regarding program content should be left to station licensees and that the application of First Amendment guarantees to broadcasters protects and gives life to this principle. Although the broadcast medium presents special circumstances, such as the scarcity of frequency space, which permit certain forms of regulation that would not otherwise be constitutionally permissible, broadcasters unanimously agree that neither *Red Lion* nor any other constitutional argument can support the type of program regulation suggested by the Court of Appeals in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*WEFM*). Since it is the *Red Lion* decision which provides much of the support for those who desire Commission regulation of formats on constitutional grounds, many broadcasters attempt to distinguish this case. The comments on *Red Lion* range from a charge of "constitutional misinterpretation" (National Association of Broadcasters, NAB), to "a shift in the First Amendment's traditional focus" (Cornhusker Television Corporation, *et al.*, hereinafter "Cornhusker"). It is argued by the National Radio Broadcasters Association (NRBA) that the decision in *Red Lion* was based on the Court's conclusion that the Fairness Doctrine, while departing from the letter of preexisting First Amendment law, served the historical purpose of the Amendment to promote free and wide-ranging debate on public issues. This result is consistent, says NRBA, with constitutional decisions which permit the government to regulate the content of speech where such content reg-

ulation has a minimal impact on communication of ideas *and* is necessary to achieve a governmental interest of very great importance. NRBA makes the argument that access to different forms of entertainment formats is less compelling in constitutional importance than access to free debate on public issues and that the impact of format regulation on speech content would be far greater and more direct than that of the Fairness Doctrine. Cornhusker argues in its Comments that *Red Lion's* treatment of the Fairness Doctrine and personal attack rules was based on the long series of FCC rulings in the area, and reliance on Congressional approval of the Fairness Doctrine found in the legislative history of § 315 of the Communications Act. Cornhusker states that the decision dealt with questions concerning broadcaster obligations to present important public questions fairly and without bias, and notes that the Court strongly intimated that other questions related to the Commission's attempted oversight of program content would raise more serious First Amendment issues. *Red Lion, supra*, at 396. Accordingly, it is asserted that *Red Lion's* doctrine is not a broad mandate that applies with equal force to the wide range of broadcaster program discretion, including format selection. Broadcasters further argue that the subsequent Supreme Court decisions in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) and *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), have somewhat diluted the far reaching constitutional

implications of *Red Lion*. Especially significant in this regard is the language in *DNC*, reaffirming the journalistic rights of broadcasters. NOW, on the other hand, finds distinctions in these decisions which make them inapplicable to the central issue under consideration herein.

4. Other constitutional theories were advanced in the comments by those parties who object to Commission regulation of entertainment formats. One of these, asserted by the National Broadcasting Company and many others, is that any attempt by the Commission to develop standards or guidelines to be applied in format regulation would be so vague as to be void under constitutional doctrine. This is so allegedly because broadcast formats contain many components, *i.e.*, music type, music selection and placement, announcers, personalities, number and quality of commercials, specialty features, news scheduling; and a change in any one or combination of such components could constitute a change in a station's program format. Another theory argued is that the action of forbidding the broadcast of a particular format would be an unconstitutional prior restraint of free speech. The NAB claims that governmental application of a prior restraint bears a heavy presumption against validity, requiring for its justification compelling circumstance and procedural safeguards rarely demonstrated to the satisfaction of courts where protected speech is involved. Cornhusker advances yet another constitutional argument, that of the First Amendment doctrine of "less Drastic Means." This doctrine,

according to Cornhusker, limits congressional power to enforce requirements that impinge upon free speech activities and is described as follows:

In a series of decisions [the Supreme Court] has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle governmental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960).

Under this doctrine, to vindicate the *WEFM* requirement for Commission involvement in format selection, Cornhusker argues that it must be shown that the rights of listeners and viewers are unconstitutionally infringed without detailed oversight. It would have to be shown that a monopoly of the otherwise "uninhibited marketplace of ideas" prevail absent detailed FCC program scrutiny. Such a showing, Cornhusker alleges, is virtually impossible. There are "less drastic means" already available for program diversity; the combination of the commercial marketplace,² community ascertainment duties; and noncommercial educational radio and television to respond to programming incentives other than those of the commercial marketplace.

² It is repeatedly alleged in the comments that the present commercial marketplace provides a wide, albeit not perfect, diversity of formats.

5. A recurring theme running through much of the broadcaster comments in the constitutional area is the recognition that the Commission does have the authority to exercise its powers in a way that affects the content of broadcast programming, but that in no instance has this authority been interpreted, by the Commission or the courts, to allow the Commission to override a licensee's discretion as to one type of legally permissible programming and order that a specific type of programming content either be retained, or if it has been removed, reinstated. Moreover, the NAB notes that although some limited FCC intrusions into programming have been approved by the courts,³ and that other decisions have upheld the Commission's refusal to intrude,⁴ no court decisions have compelled the FCC to invade the area of licensee discretion except those dealing with format change. It is argued that such direct and affirmative intervention in broadcast station programming is violative of First Amendment principles. Proponents of Commission intervention, however, argue that intrusion into entertainment format selection is no different, or not radically different, in terms of content control, from the non-entertainment areas where the Commission has intervened in the past, *i.e.*, Fairness Doctrine, political

³ *E.g.*, *Red Lion*, *supra*, 395 U.S. 367; *National Broadcasting Company v. FCC*, 319 U.S. 190 (1943); *National Association of Independent Television Producers and Distributors v. F.C.C.*, 516 F.2d 526 (2nd Cir. 1975).

⁴ *E.g.*, *DNC*, *supra*, 412 U.S. 94; *Public Interest Research Group v. FCC*, 522 F.2d 1060 (1st Cir. 1975).

broadcasting, obscenity. Moreover, NOW argues that the Commission already has taken an affirmative role in monitoring and reviewing entertainment programming. Examples of such activity are identified as: (1) the Commission's Prime Time Access Rule which prohibits the use of certain types of feature films and network programs during specific time periods; (2) the comparison of entertainment programming when a "specialized-service" station is competing with a "general-service" station for a license, *Policy Statement on Comparative Hearings*, 1 FCC 2d 393, 397 (1965); and (3) the examination of program policies and proposals if there are significant differences in the program plans of comparative license applicants. *Id.* at 398. Opponents, however, raise several points in distinguishing Commission involvement in non-entertainment programming. Evening Star states that because of the vital role non-entertainment programs play in informing the public of current news and public affairs, there is a clear and logical public interest in the Commission taking a role in ensuring that such programming addresses the needs and problems of the community of each licensee. Entertainment programming, on the other hand, does not assume the same importance to community needs. Moreover, news and public affairs are not matters of public taste or preference, but rather are of universal interest and concern to the public. Rollins Broadcasting of Delaware, Inc., claims that the "scarcity of frequencies" argument used in *Red Lion* to support, in part, the need for "government imposed" diversity

of viewpoints on controversial issue programming is inapplicable to entertainment programming. This is so because radio station entertainment is basically music provided by records, tapes, and cassettes, each of which is easily available to the public. WNCN Listeners Guild (WNCN) criticizes this reasoning, claiming that reliance on non-radio alternatives would mean that the airwaves no longer belong to the listeners. The NAB claims that the Commission's differing treatment of non-entertainment programming reflects Commission recognition that a station's entertainment format is its primary means of competition, and that competition alone would not result in sufficient news and public affairs programming.

Statutory

6. The comments filed by supporters of format regulation advance little statutory basis for their position other than the general directive of Congress that the Commission regulate in the public interest. It is upon the public benefit that such regulation would allegedly promote, though, that supporters primarily base their case. This benefit is asserted to be a greater diversity of entertainment formats in individual markets, thereby satisfying the programming tastes of more individuals than achieved by non-regulation, i.e., the competitive marketplace. The premise that the widest diversity in entertainment formats satisfies the widest number of listeners, thus promoting the public interest, is not only the belief of format regulation supporters; but also the motiva-

tion of the Court of Appeals in directing the Commission to regulate formats to "[secure] the maximum benefits of radio to all the people of the United States." *WEFM, supra* at 268. Critics of entertainment format regulation not only challenge this premise, but claim that such regulation is contrary to the Act.

7. In commenting upon the Commission's responsibility and authority under the Act, many critics of Commission regulation looked for guidance to the legislative intent of Congress. It is argued that examination of the statute itself, together with previous court interpretation, clearly demonstrates no congressional intent for the Commission to become involved in entertainment format regulation. Metromedia and Doubleday Broadcasting Company, Inc. suggest that Congress' inclusion of Section 326 in the Act proscribing censorship is virtually dispositive of the question. Other comments take a less truncated view, but claim that Congress' intent is clear from other indications. For example, although the Supreme Court, as noted in *WEFM*, has declared that "the avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States," there is no mention in the Act of formats, the nature of format diversity or the way in which such diversity is to be determined. In this connection, it should also be noted that no provision of the Act expressly grants the Commission even so much as general supervisory authority over programming content. Another indication of Congress' alleged

intent to preclude the Commission from regulating program content was its desire to create a broadcasting system based on competition. Format regulation opponents claim the *WEFM* court's statement that "there is no longer room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition" is inconsistent with the intent expressed in the Act and prior judicial interpretation. Congress' intent to create a competitive broadcasting system is said to be evident from its explicit rejection of broadcasters as common carriers (47 U.S.C. 3 (h)). Additionally, the Supreme Court recognized this intent of Congress in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), when it stated:

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public. *Id.* at 475.

Also cited is the D.C. Circuit's language in *National Association of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970), stating:

... Congress apparently believed that once the clear dangers of combinations in restraint of trade were removed, competition among those providing broadcasting services in a given area would best protect the public interest. *Id.* at 203.

Since format is all a broadcast station has to compete with, it is argued that government dictation of format content will destroy competitive broadcasting.

8. The NAB strongly argues that the intent of Congress is further demonstrated by its inclusion in the Act of Section 310(d). This section basically declares that, in passing upon assignment and transfer applications, the Commission may only consider the qualifications of the applicant before it, rather than determining whether some other applicant may be better qualified. The NAB cites several passages from the Section 310(d) legislative history, and contends that said language clearly indicates the section was intended to prohibit not only comparisons between the proposed purchaser of a broadcast station and some third party, but comparisons between the qualifications of the seller and the purchaser as well. The NAB notes that in *Wichita-Hutchinson Co.*, 20 FCC 2d 584 (1969), the Commission held that Section 310(d) did permit comparisons between a seller and buyer, but maintains that such a holding is in error and should be reversed. Accordingly, the NAB concludes that the Commission is precluded from determining whether a proposed licensee's program format serves the public interest as well, or better than, an existing licensee's program format and that this section cannot serve as a basis for format consideration. NOW disagrees with this interpretation of Section 310(d), claiming that the clear language of the statute only prohibits comparing the programming of a seller to the programming of any individual

other than the proposed purchaser; and that the statute certainly cannot be read to prohibit the Commission from considering format changes.

9. Where the differences between proponents and opponents of Commission format regulation sharply come into focus is over the question of the extent to which such regulation will "serve the public interest." Proponents contend that the increasing number of protests against proposed format changes demonstrates that programming diversity in many markets is not as broad as it should be. WNCN alleges that broadcast licensees, rather than providing diversity, are moving more and more toward a bland uniformity of programming. This belief is based, in part, on the claimed increasing trend toward syndicated radio programming and the effects of a broadcast marketplace controlled by advertising rating systems. Opponents, on the other hand, argue that the present system of leaving the choice of program format to the discretion of the licensee has produced an extremely diverse, although not perfect, selection of programming and any attempt by the government to intervene in this process would have severe adverse public interest consequences. In support of this assertion, ABC submitted a report prepared by Robert E. Henabery (hereinafter referred to as the Henabery Report), a consultant on radio positioning, programming and operations and a specialist in new radio format development. The Henabery Report states that broadcast programming, determined by competition, has produced a wide diversity in formats, particularly in

the last decade. It is claimed that in the last decade, radio stations have gone from general service programming, *i.e.*, all things for all people, to specialized programming, *i.e.*, one particular program spread throughout the broadcast day. This transition has caused broadcasters to develop programming designed to appeal to specific categories of listeners, spurring a diversity in broadcast fare. In further support of the diversity achieved by operation of the marketplace, the Henabery Report submits the results of a study conducted in Washington, D.C. and Tulsa, Oklahoma. The report concludes that Washington, D.C. is a highly specialized and, because of its particular ethnic and cultural life, individualized radio market. Tulsa, a smaller market, is beginning to take on more specialization than ever before. The report also concludes that "the greater the number of stations the greater the specialization." The NAB, in Appendix 2 to its Comments, submits a breakdown of format content in New York City and Washington, D.C., and asserts that these formats cater to almost every conceivable taste. Another oft repeated negative public interest result of regulation is that licensees forced to operate with only marginally profitable stations will economize on news, public affairs and other forms of non-entertainment programming.

10. Another basic area of disagreement between regulation critics and supporters is the role competition plays in creating program content diversity. In the competitive marketplace, NOW claims that the factor motivating broadcast programming is a desire

to maximize profits through advertising revenue; and in seeking this end, broadcasters rely on the "demographics," rather than the "size," of a particular audience in choosing a program format. NOW states that the concept behind "demographics" is that there are certain audience groups which advertisers desire to reach because these groups are the most likely to spend money for the advertisers' products. It is crucial to the advertiser that the commercial reach as many people as possible who are likely to buy the product, but it is not crucial that the advertisement reach the maximum number of listeners because the advertiser has little interest in reaching individuals unlikely to purchase the product. Accordingly, broadcasters will appeal, through their entertainment programming, to the particular audience that will enable them to maximize advertising revenues. At the same time, broadcasters will shirk program formats which appeal to those audience groups whom advertisers do not wish to reach. Thus, listeners will not receive the type of programming they prefer unless the listener happens to belong to a "demographically" desirable group.

11. Broadcasters basically contend that the forces of competition create a wide diversity of program formats, some of which serve minority tastes, since all stations cannot utilize the same general format and economically survive. If there are 20 stations in the market, the point is very quickly reached where a minority-taste audience would be larger than a station's probable share of a majoritarian-taste audi-

ence. Thus, where there are many stations in the market, as there are in most urban markets, minority tastes will be served through the normal market mechanism. There is no dispute that broadcasters program to meet the tastes of particular demographic groups. It is claimed, though, that there is no evidence that radio advertisers, as a group, favor any particular demographic segment of the audience to the exclusion of others. (See Appendix 4, NAB Comments—Analysis of Requests From National Radio Advertisers.) NOW questions the validity of this explanation of marketplace behavior, arguing that the demographics of certain minority taste audiences may not be desired by advertisers. Under these circumstances, no programming will be directed to those minority tastes and the listeners in such groups will be deprived of the benefits of radio at their first preference level. WNCN rejects the Commission's position that regulation may not produce better results in the marketplace than competition, and opines that it could do no worse.

12. Regulation critics further allege that government regulation of formats will stifle innovation and experimentation in broadcast programming; resulting in less, not more, diversity. It is claimed that broadcasters will hesitate to try new programming if they fear being compelled to continue it against their better judgment. Comments from some parties indicate that such reluctance to experiment or change formats has already occurred since the Court's and Commission's recent treatment of "format cases" (Henabery

Report, p. 39; Doubleday Broadcasting Company, Inc.). WNCN claims this is a faulty "assumption," and asserts that until a careful and unbiased study of all format changes in major markets over a meaningful period of time is conducted neither it nor the Commission will know for sure whether this assumption is correct.

13. Another common argument against regulation is that it would result in an administrative quagmire and extensive oversight. The principal problem in any scheme of format regulation is alleged to be the categorization of programming content. As noted above in this summary, it is claimed that a broadcast station's program format consists of many components, of which entertainment is only one, and that in this sense, all formats are "unique." The components of a radio format are described in the Henabery Report as material, structure and style. Material being what is broadcast by the station, *i.e.*, music, personality comments, news, interviews, contests, weather and traffic bulletins, etc.; structure being the length of the material and its position in the hour relative to other material; and style being the personality of the material and the overall personality of the structure which houses material, *i.e.*, tempo and familiarity of songs, the mixing of the music, use of logos and jingles, tone of the newscaster. Alteration of any of these elements could produce either a format modification or a format change and, according to Henabery, the line between the two is often difficult to draw. A further problem in categorizing formats is

the repeated contention in the comments that the same format may be perceived differently by different people. This conclusion was reached by Entertainment Response Analysts, a broadcast programming research company, after conducting tests on individuals who were exposed to programming believed by the testers to be extremely similar (see Metromedia Comments, Attachment 5). The regulation of formats would also have the Commission examining the day-to-day programming decisions of broadcasters on a constant basis to determine programming shifts; a task alleged to be an administrative nightmare. In addition to these practical problems of regulation, broadcasters question the fairness of regulations which would saddle one broadcaster with only a marginally profitable format, while others who declined to innovate were rewarded with profitable operations. Another question raised is why should the Commission favor one minority taste over another simply because one was tried and one was not. A survey could very well show that an untried format had more of a demand than a tried one that is "unique" and changing. WNCN claims, however, that the regulation required by the *WEFM* decision is hardly so pervasive as that in other areas, such as obscenity, prime time access, and family viewing. WNCN asserts that "to say adjudication of listeners' challenges to the loss of unique formats constitutes pervasive regulation of licensee speech is like saying that the availability of courts for libel actions involves pervasive regulation of speech and press—neither is true, both are absurd."

14. Finally, it is argued by several opponents of format regulation that the *WEFM* decision, and the argument of regulation supporters, is based on the questionable assumption that the public interest is furthered by the greatest diversity in program formats. It is the opinion of Mr. Bruce M. Owen, an assistant professor of economics at Stanford University (see NAB comments, Appendix 1), that there is no necessary relation between diversity and consumer satisfaction. This conclusion is premised on the basis that consumers can and do have preferences among stations with similar formats. It could well be that the addition of a format already in a community would be more efficient in terms of consumer satisfaction.

Parties Filing Comments and Reply Comments

Alpha Epsilon Rho National Honorary Broadcasting Society (Central Michigan University Chapter)
 American Broadcasting Company, Inc.
 American Women in Radio and Television, Inc.
 Annapolis Broadcasting Corporation
 Belden, E. S.
 Belo Broadcasting Corporation
 Bloomington Broadcasting Corporation
 Broadcast Interest Group
 Citizens Committee to Save WEFM
 Colorado Broadcasters Association
 Columbia Broadcasting System
 Communico Broadcasting
 Conroy, Tamara B.
 Coulborn, Lewis R.

Doubleday Broadcasting Company, Inc.
 Dow, Lohnes & Albertson on behalf of Cornhusker Television Corporation and 17 Other Licensees
 Dzurick, David
 Earnest, David
 The Evening Star Broadcasting Company
 GCC Communications of Chicago, Inc.
 Gsell, Charles
 KBOA, Inc.
 KEZY Radio, Inc.
 KMAM/KMOE-FM Radio
 Mazzella, Dr. Anthony J.
 Merrill, Charles E.
 Metromedia, Inc.
 Moore, Barbara
 National Association of Broadcasters
 National Broadcasting Company, Inc.
 National Organization of Women
 National Radio Broadcasters Association
 Nebraska Broadcasters Association
 Nichols, Stephen
 960 Radio, Inc.
 Normandy Broadcasting Corporation
 O'Malley-Kieffer Communications Company
 Papp, Laszlo
 Pennsylvania Association of Broadcasters
 Powell, Richard E.
 RKO General, Inc.
 Rollins Broadcasting of Delaware, Inc.
 Rounsaville, Robert W.
 Ryan, Regina
 Scripps-Howard Broadcasting Company
 Shutkin, Thomas
 Turner Communications Corporation

Voorhees, John
Wallace, Robert Pope
WEBC, Inc.
WNCN Listeners Guild

APPENDIX B

Upon receipt of the comments in Docket 20682, the Office of Plans and Policy undertook an evaluation of the economic arguments raised in those submissions as well as an empirical investigation of radio format diversity in the 25 largest metropolitan markets. The subsequent discussion will set forth our finding regarding the regulation of format changes.

The comments of Professor Bruce Owen of Stanford University merit particularly close attention.¹ Professor Owen presents an excellent analysis of the economic issues surrounding the radio format change cases as well as a convincing demonstration that federally imposed restrictions on format changes may actually result in a diminution of consumer welfare. We are particularly concerned with this latter proposition given that our own empirical investigation tends to support Owen's analysis and subsequent conclusion.

In its format change decisions, the Court of Appeals has always assumed the existence of a necessary relationship between the number of different program

¹ See Bruce M. Owen, "Radio Station Format Changes, Diversity, and Consumer Welfare," Appendix 1 of the Comments of the National Association of Broadcasters in Docket 20682.

formats available in a given market and the welfare of consumers of radio programming. At first glance, this line of reasoning would appear to be sound. If formats belonging to the category are close substitutes, then it follows that format duplication is wasteful. Those who prefer to listen to a particular type of programming gain little through duplication, while other people are deprived of additional listening opportunities. Under these circumstances it would appear that a policy designed to encourage format diversity would serve the public interest.

But this conclusion suffers from a decisive flaw. Stations programming apparently similar formats may not be regarded as close substitutes by listeners. If so, then we can no longer be certain that maximization of diversity among apparently distinct formats would necessarily tend toward maximizing the satisfaction of radio listeners. Listeners may prefer to have more variety of a given type of music than the opportunity to hear a distinctly different type of fare. To illustrate, suppose a station currently programming classical music proposes to change its format to progressive rock. Further suppose that members of the listening public who prefer classical music object on the ground that another station is already devoting most of its broadcast day to rock music. Should the licensee be permitted to change his format?

The answer to this question is not immediately obvious. In theory preference should be given to that format which is of greater value to the consumers. Unfortunately, the Commission will find it impossible

to measure the relative values of different formats because there exists no litmus or *a priori* way of measuring how much particular formats are worth to the audiences. All that can be known is simply how many people listen to available programs.

Unfortunately, the size of a station's audience is not necessarily an appropriate measuring stick of the degree of satisfaction which listeners derive from its programming. That is, two different formats which attract audiences of equal size may not be of equal value. Preferences expressed by the audience of one format may be much stronger than preferences for the other, in which case the former should be the more valuable. In order to ascertain which format is the more valuable, one would have to know the intensity of demand for each. Again, there exists no acceptable, reliable way of measuring aspects of these consumer preferences because consumers are not required to pay for the opportunity to listen to radio. Nor does a willingness by a group of listeners to contest a format change by litigation adequately express a cognizable intensity of preference for the format that they desire to have retained (or recovered). In every case, an intensity value could be assigned only after obtaining some information about the economic resources of the protestants and the opportunity costs associated with their protest. Given the legal complexities and expenses that characterize format change litigation, one would expect that a willingness to go forward with such cases would be especially typical of persons of higher educational attainment and socio-economic

status. If this assumption is so, then it follows that rewarding the format preference of protestants would *by definition* discriminate against the effect on less well-off listeners who might be the beneficiaries of a licensee's proposed new programming plans.

In sum, there exists no economically rational basis for deciding which broadcasters should be allowed to change their formats and which should not. Nor, it may be added, is there any basis on which to conclude that Commission interference in the absence of such information would accord with any plausible version of the public interest. Even in the largest markets, the number of radio stations is insufficient to assure that every radio listener will have access to his first preference of entertainment programming. This is simply an indication not so much of the imperfections of our advertiser-supported radio industry as it is of the pluralistic nature of our society. However unfortunate, broadcasters will inevitably cater to some tastes at the expense of others, regardless of what institution—whether the free market or the federal government—must bear the responsibility for determining the types of formats that will be made available.

Traditionally, we have relied on competition to make these choices. Admittedly, this is not a perfect mechanism of format selection since those decisions will, for the most part, be made on the basis of which format promises to maximize the size of the audience. Again this may lead to selection of certain formats which are actually of lesser value to consumers than are

others which broadcasters could feasibly provide. Whatever the shortcomings of this allocative mechanism, it is highly unlikely that the Commission hearings will improve on it. In the absence of any information on the value which consumers place on particular formats, we simply cannot make a rational judgment as to which formats warrant protection and which do not.

This conclusion is further evidenced by an empirical investigation of format diversity in the 25 largest metropolitan markets. Table 1 summarizes an assessment of the availability of 18 logical groupings of format types in these markets as defined in the 1975 edition of *Broadcasting Yearbook*.² The categorization is, of course, somewhat subjective. For example, the "Black" format category consists of "jazz," "rhythm and blues," "soul" or any combination of the above. The "Classical Music" format, on the other hand, encompasses everything from the baroque oratorios of Handel to P.D.Q. Bach or Leonard Bernstein's "Mass." Afficionados may, of course, object strongly to the suggestion that these composers and their works belong to the same pigeon-hole; this indicates that any effort to classify formats will be arbitrary. We therefore hasten to add that Table 1 is meant to provide only a rough indication of format diversity in the 25 largest markets. Moreover, as should be evident from the number and type of sub-categories which make up each of the major group-

² *Broadcasting Yearbook 1975*, Washington: Broadcasting Publications Inc., 1975.

ings (see Table 2), the figures in Table 1 by no means fully reflect the breadth and variety of programming available to listeners in these geographic areas.

In spite of this qualification, the figures indicate a variety of formats are rather evenly distributed across all stations, particularly those operating in the 10 largest markets, not a surprising finding given the rather high degree of competition which characterizes the radio industry in these areas of the country. Financial success is generally determined by the broadcaster's ability to program a format which is both popular and distinct enough to attract a relatively large, loyal audience.

An effort was also made to evaluate the relationship between the type of format programmed by a station and its share of the audience³ as a rough measure of the degree to which stations programming the same format are considered by consumers to be close substitutes for one another. This is an extremely important point since the notion that format duplication is wasteful rests on the assumption that listeners are no better off when they are furnished with a choice between two stations programming the same type of music than they would be if only one of those stations were available. If this assumption proves to be false, then it is simply fallacious to con-

³ The share of the audience simply reflects the percentage of all listeners who are listening to radio at a given time which are tuned into a particular station. For example, if station WXYZ has a share of 3 between 7 and 9 a.m., then we know that approximately 3 percent of the audience listening to radio during that period were tuned into WXYZ.

clude that seemingly similar program types are in fact duplicative and consequently wasteful. Indeed, preference for one station over another clearly indicates that each is offering a distinctly different type of service. If they are perceived as being different, then we again face the dilemma of deciding which format is the more valuable and worth protecting, knowing full well that restrictions on format change will deprive some other group of a format which they would prefer to listen to if given the opportunity.

The degree of substitution between stations programming the same type of format is very much less than might at first be supposed. We performed a statistical analysis of the relationship between audience shares and the type of programming presented by individual stations in order to test the hypothesis that format type has no effect on audience ratings. If this hypothesis is true, then it follows that our format categories do not realistically indicate how much format diversity is available in these markets. It would also suggest that those stations programming seemingly similar types of formats are perceived by listeners to be quite different and accordingly are not close substitutes for one another.

The results of this analysis are reported in Table 3. They show that while the type of format did have a significant impact on audience, the magnitude of that impact is relatively small. Specifically, differences in formats accounted for only 6.6 percent of the variation in audience shares. Moreover, the results show that the variation in audience shares within

given format types is nearly as large as the variation between different types. Again, this indicates that formats of the same type (as defined in Table 1) are not close substitutes for one another.

There are any number of possible explanations for this phenomenon. As mentioned previously, listeners may perceive distinct differences in the types of programming common to a single format category. To the extent that categories do not capture whatever it is about the station's programming that consumers perceive as "special," they are analytically meaningless and accordingly, do not afford an appropriate basis on which to judge whether a station's programming is "unique."

This problem could be ameliorated to some extent by increasing the number of descriptive categories of formats, but this procedure would further complicate an already difficult hearing process inasmuch as administrative law judges will find it increasingly difficult to assess the extent of format duplication. Consequently, their decisions will likely become ever more arbitrary and less intelligible thereby increasing the probability that such decisions will run counter to the public interest. Nevertheless, this is precisely what must be done if the Commission is to follow the procedures applicable to format change protests outlined by the Court of Appeals.

In conclusion, we believe that format regulation is unnecessary and may very well impose costs on the general public. We recognize the shortcomings of the marketplace in allocating formats. However, given the difficulties in defining a meaningful format clas-

sification coupled with a total lack of information on the relative values associated with different types of programs, we are convinced that Commission decisions in this matter will automatically lack a rational underpinning. In short, they will simply reflect the subjective and necessarily arbitrary opinions of administrative law judges. We fail to see how this process will result in a more efficient allocation of entertainment formats than would be obtained if programming decisions were left in the hands of broadcast licensees, who are, after all, far more familiar with listeners' tastes.

TABLE 1

COMMERCIAL RADIO FORMAT AVAILABILITY IN THE
25 LARGEST METROPOLITAN MARKETS

Number of Stations Programming Specified Format

FORMAT TYPE	New York	Los Angeles	Chicago	Philadelphia	Detroit	Boston	San Francisco	Washington	Nassau-Suffolk	Dallas-Ft. Worth	Total
1. Beautiful Music	1 (2.3)*	5 (8.5)	8 (12.5)	3 (8.1)	4 (11.4)	3 (9.1)	2 (5.1)	2 (5.0)	-	2 (5.3)	30 (7.4)
2. Black	3 (7.0)	6 (10.2)	5 (7.8)	3 (8.1)	3 (8.6)	1 (3.0)	2 (5.1)	4 (10.0)	1 (5.3)	2 (5.3)	30 (7.4)
3. Classical	2 (4.7)	2 (3.4)	2 (3.1)	2 (5.4)	-	1 (3.0)	3 (7.7)	2 (5.0)	-	1 (2.6)	15 (3.7)
4. Contemporary	5 (11.6)	10 (17.0)	6 (9.4)	3 (8.1)	3 (8.6)	7 (21.2)	8 (20.5)	9 (22.5)	6 (31.6)	6 (15.8)	63 (15.5)
5. Country & Western	1 (2.3)	5 (8.4)	5 (7.8)	3 (8.1)	2 (5.7)	2 (6.1)	-	7 (17.5)	1 (5.3)	9 (23.7)	35 (8.6)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (Continued)
Number of Stations Programming Specified Format

FORMAT TYPE	New York	Los Angeles	Chicago	Philadelphia	Detroit	Boston	San Francisco	Washington	Nassau-Suffolk	Dallas-Ft. Worth	Total
6. Ethnic/Foreign Language (except Spanish)	1 (2.3)	1 (1.7)	4 (6.3)	-	2 (5.7)	2 (6.1)	-	-	-	-	10 (2.5)
7. Golden Oldies	1 (2.3)	2 (3.3)	1 (1.6)	-	-	1 (3.0)	-	-	-	1 (2.6)	6 (1.5)
8. Middle of the Road	9 (20.9)	10 (17.0)	15 (23.4)	12 (32.4)	11 (31.4)	7 (21.2)	10 (25.6)	5 (12.5)	9 (47.4)	9 (23.7)	97 (23.8)
9. News	2 (4.7)	2 (3.4)	3 (4.7)	1 (2.7)	1 (2.9)	1 (3.0)	3 (7.7)	3 (7.5)	-	1 (2.6)	17 (4.2)
10. Progressive (Rock)	3 (7.0)	1 (1.7)	5 (7.8)	2 (5.4)	3 (8.6)	3 (9.1)	2 (5.1)	1 (2.5)	1 (5.3)	1 (2.6)	22 (5.4)
11. Public Affairs	2 (4.7)	-	-	-	-	-	-	-	-	-	2 (0.5)
12. Religious	2 (4.7)	4 (6.8)	-	2 (5.4)	3 (8.6)	1 (3.0)	2 (5.1)	3 (7.5)	-	3 (7.9)	20 (4.9)
13. Rock	2 (4.7)	2 (3.4)	3 (4.7)	2 (5.4)	-	1 (3.0)	1 (2.6)	2 (5.0)	-	2 (5.3)	16 (3.7)
14. Spanish	2 (4.7)	2 (3.4)	2 (3.1)	-	-	-	2 (5.1)	1 (2.5)	-	1 (2.6)	10 (2.5)
15. Talk	3 (7.0)	2 (3.4)	-	2 (5.4)	-	-	-	1 (2.5)	-	-	8 (2.0)
16. Top 40	2 (4.7)	3 (5.1)	-	1 (2.7)	-	-	2 (5.1)	-	-	-	8 (2.0)
17. Varied	2 (4.7)	1 (1.7)	5 (7.8)	1 (2.7)	1 (2.9)	3 (9.1)	-	-	1 (5.3)	-	14 (3.4)
18. Other	-	1 (1.7)	-	-	2 (5.7)	-	2 (5.1)	-	-	-	5 (1.2)
Total Stations	43	59	64	37	35	33	39	40	19	38	407
No. of Different Formats	17	17	13	13	11	13	12	13	6	12	

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (Continued)

Number of Stations Programming Specified Format

FORMAT TYPE	Pittsburgh	St. Louis	Houston	Baltimore	Cleveland	Minneapolis-St. Paul	Seattle-Everett-Tacoma	Atlanta	San Diego	Miami	Total
1. Beautiful Music	2 (5.3)	1 (2.9)	2 (6.3)	1 (3.1)	3 (13.0)	4 (12.9)	4 (12.5)	1 (2.9)	4 (16.7)	5 (21.7)	27 (8.9)
2. Black	1 (2.6)	2 (5.9)	2 (6.3)	4 (12.5)	3 (13.0)	1 (3.2)	2 (6.3)	4 (11.8)	-	1 (4.4)	20 (6.6)
3. Classical	-	-	1 (3.1)	2 (6.3)	1 (4.4)	1 (3.2)	2 (6.3)	1 (2.9)	1 (4.2)	1 (4.4)	10 (3.3)
4. Contemporary	13 (32.2)	6 (17.7)	5 (15.6)	4 (12.5)	1 (4.4)	4 (12.9)	4 (12.5)	5 (14.7)	6 (26.0)	4 (17.4)	52 (17.2)
5. Country & Western	2 (5.3)	7 (20.6)	7 (21.9)	5 (15.6)	3 (13.0)	4 (12.9)	3 (9.4)	8 (23.5)	2 (8.3)	2 (8.7)	43 (14.2)
6. Ethnic/Foreign Language (except Spanish)	-	-	-	-	2 (8.7)	-	-	-	-	1 (4.4)	3 (1.0)
7. Golden Oldies	-	-	-	-	1 (4.4)	1 (3.2)	-	1 (2.9)	-	-	3 (1.0)
8. Middle of the Road	11 (29.0)	11 (32.4)	7 (21.9)	9 (28.1)	6 (26.1)	12 (38.7)	7 (21.9)	5 (14.7)	6 (25.0)	3 (13.0)	77 (25.4)
9. News	-	1 (2.9)	-	-	-	1 (3.2)	-	2 (5.9)	1 (4.2)	-	5 (1.7)
10. Progressive (Rock)	2 (5.3)	2 (5.9)	3 (9.4)	-	-	2 (6.5)	3 (9.4)	-	1 (4.2)	1 (4.4)	14 (4.6)
11. Public Affairs	-	-	-	-	-	-	-	-	-	-	-
12. Religious	4 (10.5)	1 (2.9)	1 (3.1)	3 (9.4)	-	-	3 (9.4)	2 (5.9)	1 (4.2)	1 (4.4)	16 (5.3)
13. Rock	-	-	-	3 (9.4)	2 (8.7)	-	1 (3.1)	1 (2.9)	2 (8.3)	-	9 (3.0)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (Continued)

Number of Stations Programming Specified Format

FORMAT TYPE	Pittsburgh	St. Louis	Houston	Baltimore	Cleveland	Minneapolis-St. Paul	Seattle-Everett-Tacoma	Atlanta	San Diego	Miami	Total
14. Spanish	-	-	1 (7.1)	-	-	-	-	-	-	3 (13.0)	4 (1.3)
15. Talk	-	-	1 (3.1)	-	1 (4.4)	-	2 (6.3)	-	-	1 (4.4)	5 (1.7)
16. Top 40	-	2 (5.9)	-	1 (3.1)	-	-	-	2 (5.9)	-	-	5 (1.7)
17. Varied	2 (5.3)	1 (2.9)	2 (6.3)	-	-	1 (3.2)	1 (3.1)	2 (5.9)	-	-	9 (3.0)
18. Other	1 (2.6)	-	-	-	-	-	-	-	-	-	1 (0.3)
Total Stations	38	34	32	32	23	31	32	34	24	23	303
No. of Different Formats	9	10	11	9	10	10	11	12	9	11	

Number of Stations Programming Specified Format

FORMAT TYPE	Tampa St. Petersburg	Milwaukee	Denver-Boulder	Cincinnati	Buffalo	Total	Total - Top 25 Markets
1. Beautiful Music	4 (13.3)	1 (3.7)	2 (5.5)	2 (11.8)	2 (9.1)	11 (8.7)	68 (8.1)
2. Black	1 (3.3)	3 (11.1)	1 (3.2)	1 (5.9)	2 (9.1)	8 (6.3)	58 (6.9)
3. Classical	-	1 (3.7)	1 (3.2)	-	-	2 (1.6)	27 (3.2)
4. Contemporary	4 (13.3)	7 (25.9)	4 (12.9)	4 (23.5)	4 (18.2)	23 (18.1)	138 (16.5)

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 1 (Continued)
Number of Stations Programming
Specified Format

FORMAT TYPE	Tampa-St. Petersburg	Milwaukee	Denver-Boulder	Cincinnati	Buffalo	Total	Total—Top 25 Markets
5. Country & Western	8 (26.7)	4 (14.8)	2 (6.5)	3 (17.6)	3 (13.6)	20 (15.7)	98 (11.7)
6. Ethnic/Foreign Language (except Spanish)	-	-	-	-	-	-	13 (1.6)
7. Golden Oldies	-	-	-	-	1 (4.5)	1 (0.8)	10 (1.2)
8. Middle of the Road	6 (20.0)	6 (22.2)	9 (29.0)	2 (11.8)	4 (18.2)	27 (21.3)	201 (24.0)
9. News	-	-	1 (3.2)	-	-	1 (0.8)	23 (2.8)
10. Progressive (Rock)	1 (3.3)	2 (7.4)	4 (12.9)	1 (5.9)	2 (9.1)	10 (7.9)	46 (5.5)
11. Public Affairs	-	-	-	-	-	-	2 (0.2)
12. Religious	3 (10.0)	1 (3.7)	2 (6.5)	3 (17.6)	1 (4.5)	10 (7.9)	46 (5.5)
13. Rock	2 (6.7)	1 (3.7)	2 (6.5)	-	-	5 (3.9)	29 (3.5)
14. Spanish	-	-	1 (3.2)	-	-	1 (0.8)	15 (1.8)
15. Talk	-	-	1 (3.2)	-	-	1 (0.8)	14 (1.7)
16. Top 40	1 (3.3)	-	-	1 (5.9)	3 (13.6)	5 (3.9)	18 (2.2)
17. Varied	-	1 (3.7)	1 (3.2)	-	-	2 (1.6)	25 (3.0)
18. Other	-	-	-	-	-	-	6 (0.7)
Total Stations	30	27	31	17	22	127	837
No. of Different Formats	9	10	13	8	9		

* Figures in parentheses represent the percentage of all commercial stations in that market which program the specified format.

TABLE 2
Program Subcategories Belonging To
Major Format Classifications

MAJOR FORMAT CLASSIFICATION	SUBCATEGORIES
Beautiful Music	Good Music Instrumental
Black	Jazz Rhythm and Blues Soul
Classical	Concert Fine Music Semi-classical Serious Music
Contemporary	Popular Request
Country and Western	Country Blue Grass Country-politan Contemporary Country Modern Country
Ethnic/Foreign Language	
Golden Oldies	Nostalgia Old Gold Solid Gold Classic Gold Solid Gold Rock
Middle of the Road	Adult Adult Contemporary Bright Up-Tempo Good or Easy Listening Standards Entertainment Conservative
All News	
Progressive	Underground Hard Rock Folk Alternative Free Form Progressive Rock
Public Affairs	
Religious	Gospel Sacred Christian Inspirational

Source: Broadcasting Yearbook 1975

Note: Stations which did not list their format in the Yearbook were contacted by telephone and asked to provide the information.

TABLE 2 (Continued)

Rock	
Spanish	
Talk	Discussion Interview Personality Informational
Top 40	
Varied	
Other	

TABLE 3

Results of the Analysis of the Relationship
Between Audience Ratings and Entertainment Formats
of Radio Stations Licensed to the 25 Largest Metropolitan Markets

Multiple R = .25738	Analysis of Variance of	Sum Sq.	Mean Sq.	F
R ² = .06624	Regression	17	744.27	43.780
Std. Error = 3.7008	Residual	766	10491.10	13.696

Variables in the Equation

Format	Coefficient	Std. Error	F
Beautiful Music	1.3445	.87884	2.340
Black	.5324	.8878	.360
Classical	- 1.1122	1.0580	1.106
Contemporary	.6465	.80625	.643
Country & Western	- .35232	.8387	1.033
Ethnic/For. Lang.	- 1.765	1.2354	2.042
Golden Oldies	.8898	1.3390	.442
Middle of the Road	- .12685	.7871	.026
News	2.9054	1.0818	7.214*
Progressive	- .4836	.9391	.265
Public Affairs	- 2.158	2.7195	.630
Religious	- 1.8628	.93484	3.970*
Spanish	- .5247	1.2997	.163
Talk	1.3920	1.2655	1.210
Top 40	1.0170	1.1102	.839
Varied	.1587	1.0955	.021
Other	- 1.5080	1.6824	.803
Rock (Constant)	2.408		

* Indicates that the equation or variable was significant at a .05 level of confidence.

DISSENTING STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS

In Re: Changes in Entertainment Formats

(Docket No. 20682)

I do not dissent because I disagree that our concern for the loss of unique program formats must

be restrained to some extent by the anti-gravitational energy of the First Amendment.¹ Nor do I disagree that government review of format selection—if not tempered—has the potential to impress us into a Section 326 minefield which no civil libertarian would countenance. Nor, again, do I disagree that the “marketplace” abhors an unfilled commercial need and that enterprise generally will hasten to satisfy unmet demands sufficiently identified and sufficiently lucrative.

I do dissent because, without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces. The Commission’s role in the commercial regulatory structure is well defined.²

¹ But see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) where the Supreme Court indicated that the First Amendment is not abridged by the Commission “in interesting itself in *general program format* and the kinds of programs broadcast by licensees.” (Emphasis added). See also my recent dissent in Docket No. 20203 (*Use of “Re-Run” Material in Prime Time*), — FCC 2d —, 76-639, July 19, 1976 (outlining authority for FCC program interest).

² With respect to the regulatory role involving programming functions, see generally *Red Lion* (“[i]t is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas which is crucial” 395 U.S. at 390); *National Broadcasting Company v. FCC*, 319 U.S. 190 (1943); *N.A.A.T.P.D. v. FCC*, 516 F.2d 526 (2d Cir. 1975).

I do not intend to imply a desire for the end of "format radio" or wish to impose a comprehensive duty on every station to proportionately serve every entertainment preference. Neither do I wish to impede program experimentation and creativity. But, equally, I stand by the *Separate Statement* of former Chairman Dean Burch in the *WEFM* case, which I joined, recognizing that extreme cases should compel our official attention. It was stated:³

This is not to say, however, that licensees or applicants have unbridled discretion in selecting their entertainment formats. The Commission will take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming.

It could be, in light of the majority's vigorous arguments herein, that the courts, upon re-evaluation, will find that the present case law with respect to agency format review is overly intrusive.⁴ I can only say that, if they do, I strongly feel that guidance must be given as to other actions to ensure that the Commission has the flexibility to correct significant neglect of the tastes, needs and interests of substantial

³ *Zenith Radio Corporation*, 40 FCC 2d 223 at 230 (1973).

⁴ In that connection, I suggested an approach to implementation of the judicially prescribed standards in my concurrence to the initiation of this Docket, 57 FCC 2d at 587, the attempted application of which I would have preferred. However, we have not fully experimented with those present standards ordained by the Court of Appeals or tried other criteria that might have been acceptable.

minority segments and to promote the diversity that is the linchpin of our regulation of public trustees. Thus, it is unquestionable that the Court of Appeals was correct in noting that a primary mission of this agency is to secure "the maximum benefits of radio to all the people of the United States," *Citizens Committee to Save WEFM, Inc. v. FCC*, 506 F.2d 246, 268 (D.C. Cir. 1974), and that accomplishment of that goal must not be hindered materially by absolutist orthodoxies.

SEPARATE STATEMENT OF COMMISSIONER GLEN O. ROBINSON

My views on this subject were set forth in some detail in a statement accompanying the original notice of inquiry. They were, and are, completely in accord with the Commission's excellent opinion here. There is, however, one point that is omitted from the majority opinion that needs mention, the problem of uneven distribution of burdens arising from the *WEFM* mandate. I addressed this problem in my earlier separate statement, 57 FCC 2d at 598-99 and, eschewing modesty, I think it's worth quoting here:

[If] our assumptions about the relationship between formats, licensees and the public interest have been beside the mark for all these years, . . . then it seems to me unthinkable that we should allow the consequences . . . to fall asymmetrically on licensees who are seeking assignment authorization. Indeed, elementary consid-

erations of fair play as well as constitutional principles of equal protection would seem to forbid the Commission from placing on any one licensee the full weight of the obligation to promote diversity without imposing an equivalent burden of obligation to the public interest in diversity on its competitors . . . [If] the FCC's responsibilities to the public interest include the obligation to implement what the Court of Appeals has described as the "undoubted intention" of Congress that all major cultural groups be represented to the extent possible, I can see no escape from market by market allocation proceedings which would determine what array of formats a particular community required, together with which station would be allowed to use which format. With all its evils, this system clearly would be fairer than the one we have now (under the *Voice of Arts-Progressive Rock-WEFM* mandate) which, like Browning's Caliban on Setebos, lets "twenty pass and stone[s] the twenty-first/Loving not, hating not, just choosing so."

This consideration, of course, meshes with those that the Commission addresses and fortifies our conclusion that the regulation of formats is a business from which we should altogether abstain.

One final point: the Commission's opinion quotes a statement by the Court of appeals that "agencies and courts together constitute a 'partnership' in furtherance of the public interest and are collaborative instrumentalities of justice." *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 851-52 (D.C. Cir.

1970), *cert. denied*, 403 U.S. 923 (1971). This formulation of our relationship can be useful as a general, philosophical guide providing too much is not made of it. Just as the Court doubtless does not intend by this or any other expression to suggest that it has the responsibility for original formulation of communications policy or *de novo* review of Commission actions (as the Court itself makes clear in *Greater Boston*), so it should not be understood by our action here that we construe this partnership notion to give us the right to overrule the Court's mandate. While we draw on this partnership concept to support our firm expression of independent views on this matter contrary to those of the Court of Appeals, I trust all will recognize that we do so in the respectful posture of a junior partner who knows how to march once the marching orders have been authoritatively pronounced—once and for all.

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

Docket No. 20682

IN THE MATTER OF
DEVELOPMENT OF POLICY RE: CHANGES IN THE
ENTERTAINMENT FORMATS OF BROADCAST STATIONS

MEMORANDUM OPINION AND ORDER

(Adopted: July 27, 1977;

Released: August 25, 1977)

BY THE COMMISSION: COMMISSIONER HOOKS DISSENT-
ING; COMMISSIONER WASHBURN ABSENT; COMMIS-
SIONER FOGARTY CONCURRING AND ISSUING A SEPA-
RATE STATEMENT.

1. The Commission has before it for reconsideration its Memorandum Opinion and Order in Docket No. 20682, 60 FCC 2d 858 (1976), concerning policies and practices with respect to changes in the entertainment formats of broadcast stations.¹

¹ Petitions for reconsideration were filed by Frank Kahn, the Office of Communications of the United Church of Christ, the Action Alliance of Senior Citizens of Greater Philadelphia, the WNCN Listeners' Guild, and Classical Music Supporters, Inc. We have also considered the late-filed comments of Molly Wilson.

2. This Order is the result of a public inquiry, 57 FCC 2d 580 (1976), which was prompted by the opinion of the Court of Appeals, *en banc*, in *Citizens Committee to Save WEFM, Inc. v. FCC*, 506 F.2d 246 (D.C. Cir. 1974). *WEFM* is the latest in a line of cases which hold that the Commission must conduct a hearing to determine whether a proposed sale of a broadcast station is in the public interest whenever (a) the purchaser intends to discontinue the station's existing entertainment format, (b) there has been a significant public protest complaining that the effect of this change would be to deprive listeners of a format not otherwise available in the market, and (c) there exists a question as to whether the format is, or could be, economically viable. After affording an opportunity for public comment on this matter, the Commission concluded that the regulatory scheme envisioned by the Court of Appeals was "inconsistent with our understanding of congressional policy as manifested in the Communications Act, contraproductive in terms of maximizing the welfare of the radio-listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation and experimentation in radio programming." 60 FCC 2d at 865-66. In issuing this statement, we were fully cognizant of the fact that an administrative agency is not authorized to overrule or reverse a mandate of the Court of Appeals. Our intention was simply to apprise the Court of the fact that, after a thorough reconsideration of the issues concerning changes in

entertainment formats, we were firmly convinced that the regulatory policy outlined in *WEFM* represented a serious departure from the policies which we believe are required by the Communications Act and the First Amendment. It is hoped that the Commission's Order will provide a helpful basis for further judicial consideration.

3. In the Order, we noted that the Communications Act draws a fundamental distinction between common carrier regulation and broadcast regulation. Common carriers and public utilities are subject to a comprehensive and pervasive scheme of governmental supervision, which typically includes an obligation to carry the messages of all customers on a non-discriminatory basis, see, *e.g.*, 47 U.S.C. § 201(a), and an obligation to continue service unless, and until, an administrative agency finds that its abandonment would serve the "public convenience and necessity," see, *e.g.*, 47 U.S.C. § 214. Congress carefully considered the question of whether broadcasters should be subject to common carrier regulation and concluded that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h). In contrast to the regime of detailed regulation which characterizes the world of the common carrier:

The Act recognizes that the field of broadcasting is one of free competition. . . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broad-

casters to survive or succumb according to his ability to make his programs attractive to the public.

FCC v. Sanders Brothers Radio Stations, 309 470, 474 (1940).

4. We have expressed the view that this statutory distinction between common carriage and broadcasting has clear implications with respect to entertainment formats. Various parties requesting reconsideration of our order disagree with this conclusion and contend that free competition and common carriage are "but two points on a continuum rather than mutually exclusive and all inclusive alternatives." (Kahn Pet., p. 6). While it may, indeed, be useful to look upon these concepts as points on a continuum, it must be recognized that, as we move further along the line in the direction of greater regulation, we will at some point have abandoned the Congressional plan of using competition as the means of securing the maximum benefits of radio to all the people of the United States. In this regard, it must be recognized that meaningful competition between stations must necessarily focus on program formats. There is virtually no other area in which competition is possible.

5. The extent to which the Court of Appeals' policy represents a departure from the stature policy of free competition is made more apparent when we consider the regulatory tools which would be necessary to implement a scheme of format regulation. The Court has held that a unique format may not be abandoned unless it can be demonstrated that it is

financially untenable, and that the station's poor financial position is "attributable to the format itself" rather than to other factors. 506 F.2d at 262. According to the petition of the United Church of Christ:

All this means is that the Commission has an obligation to examine the licensee's results of operation to determine that the loss was not created by unreasonable salaries, extraordinary casualty losses, unrelated investments, deduction for expenditures which should have been capitalized, improvident or wasteful expenditures, etc. *This is a task which rate regulating bodies perform every day of the week. The Commission exercises similar responsibilities in regulating common carriers.*

(UCC Pet., pp. 31-32) (emphasis added). While we do not agree with the Church's assessment of the degree of difficulty involved in this form of regulation, we do agree that it has much in common with the Congressional plan for regulating common carriers.²

6. We believe that the record in Docket No. 20682 demonstrates the reasonableness of the Congressional decision to rely on competition to promote the public interest in broadcasting. In our major cities, market forces have resulted in a wide variety of specialized

² Some parties would carry the analogy much further. One petitioner suggests that the most direct way of dealing with the problem envisioned by the Court of Appeals would be to reduce "economic determinism" by placing a limit on broadcast profits and to treat broadcasting as a "quasi-utility." (Kahn Pet., pp. 13-14).

radio formats. As we have previously noted, the "menu" in New York "includes all-news, classical music, rhythm and blues, Jewish ethnic, Greek ethnic, Spanish, country, modern country and gospel, talk, easy listening, middle of the road, show tunes, beautiful music, popular standard, and one which calls itself 'mellow.'" 60 FCC 2d at 863. The Court of Appeals has stated that this form of diversity is inadequate because it fails to serve "the diverse interests of all the people of the United States . . . to the maximum extent possible." 506 F.2d at 268 (emphasis added). A number of parties requesting reconsideration have echoed this view stating, for example, that the number of formats is "limited by the fact that possible (and probably nonexistent) formal types such as comedy, live Music, Documentary (both public affairs and cultural), Drama, Quiz Show, etc." are not presented in the major markets. (Kahn Pet., p. 8). It is also suggested that one can conceive of formats which are inherently superior to those which are presently heard by the public. Thus, the United Church of Christ suggests that "expert witnesses could provide a rational basis for believing that programming drawn from the culture of say, China or Japan, would make a greater contribution to the diversity of social, political, esthetic, moral and other ideas than another 'Request' station." (UCC Pet., p. 20). We must concede that, even in our largest radio markets, competition does not result in the widest variety of clearly distinct formats which can be conceived of by the mind of man (or in the Court's language pro-

mote diversity "to the maximum extent possible"). At the same time, we do not believe that it is appropriate to measure the success of competition against such a standard.

7. We understand the complaint of the Action Alliance that the emphasis on demographics in broadcast advertising may cause the interests of its members to be underrepresented. The model of free competition does not work to provide perfectly equal treatment for all categories of citizens, as we recognized in our earlier order and as the Court had observed in *WEFM*. While the presentation of formats may tilt in favor of other demographic groups, we have seen no evidence that the entertainment tastes of the elderly have been ignored by broadcasters. In any case, neither Action Alliance nor any of the other proponents of FCC format regulation come to grips with the alternative to the imperfect system of free competition that we believe Congress mandated in the Act—that is, a system of broadcast programming by government decree. We adhere to the view expressed in the Order "that our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion." 60 FCC 2d at 865.

8. Although it is recognized that competition will result in some degree of format duplication, we firmly believe that continued reliance on forces in the marketplace provides a positive benefit to the public by allowing listeners to give some means of expressing

"whether their preferences for diversity *within* a given format outweighs the desire for diversity *among different formats*," 60 FCC 2d at 863, and also by providing a competitive spur which assures that stations offering popular format types will not become indifferent to the tastes of their listeners. The staff study which was associated with our Order provides support for the assumption that audiences perceive and appreciate differences between seemingly similar formats.³ Unfortunately, there is no way to determine the *intensity* of consumer demand for particular formats, and whether listeners would prefer an entirely new format to a variation within an established format. One commenting party asks why the absence of a means of measuring demand-intensity should operate to favor the market place over Commission regulation. (Action Alliance Pet., p. 5). One answer is that, unless we were to favor regulation for its own sake, it would be hard to justify rules which for all we know may do more harm than good. Even if we occasionally guessed right and opted for a format which was consistent with the desires of radio listeners, the very existence of regulation in this field could be expected to have a chilling effect on the development of new entertainment formats, and on the ability of stations to respond to the ever-changing tastes and needs of our society.

³ The staff studies reproduced as Appendix B to the Order consisted of merely a compilation and analysis of information readily available to the public. The studies were done shortly before release of the Order and have been made available in their entirety to any party who desired to see the documentation supporting the study.

9. Moreover, we would note that arguments such as these and similar ones made by other petitioners reflect what in our view is a disturbing trend that has resulted in this Commission being drawn into the supervision of broadcast programming to an extent that is consistent with neither the intent of the Communications Act nor with sound public policy. The stated goal of the United Church of Christ in this regard—preserving the public's access to the rich diversity of cultural traditions in this country and in others—is a worthy goal and one that is without doubt in the public interest. The Commission has, in a number of significant ways over the years, recognized and taken action to foster that goal. That action, though, was of an indirect nature related to the structure of the broadcast industry—the chain broadcasting rules, the multiple ownership rules, the prime time access rules—and did not involve the type of direct government involvement in programming that these petitioners seem to want, and that the *WEFM* standards seem to require.

10. We continue to believe that the allocation of formats by market forces has a highly desirable element of flexibility which could not be approximated by any system of governmental supervision. The uncertainty, expense and delay which are inevitably connected with an evidentiary hearing are factors which any prudent business man would have to consider prior to proposing a change of format. Furthermore, it may be expected that these matters will weigh very heavily in cases involving the transfer

of a station to new ownership. In such cases, it will frequently be difficult to hold together a new organization and the financing necessary to support it over an extended period of time. This problem will pose particularly serious difficulties for groups with limited access to risk capital. Such individuals may raise the financing necessary to purchase a station only to find out that capital will not be available to cover the costs associated with extended administrative proceedings.

11. The probability of a chilling effect resulting from the prospect of a hearing is not the only problem that would be associated with a program of format regulation. As we have previously indicated, the administration of such a program would require “a comprehensive, discriminating and continuing state surveillance.” 60 FCC 2d at 865, *quoting, Lemon v. Kurtzman*, 401 U.S. 602, 619-20 (1971). The lines which distinguish one format from another are becoming increasingly obscure. It is well known, for example, that many artists may be heard with frequency on stations with a variety of formats. Distinctions between formats become even more difficult to make when it is recognized that a station's format may evolve over a period of time rather than changing all at once. In recent years, for example, progressive rock stations have moved away from the “high-energy” and “heavy-metal” sounds that dominated this format in the 1960's; such changes may take place over a period of years with softer, more harmonious records gradually replacing titles with hard

rock characteristics. In the end, we are left with a sound which is still properly referred to as "progressive rock," but which has changed substantially so that many of the station's original listeners may no longer be satisfied, while a large group of new listeners may be attracted. In these circumstances, it is extremely difficult to ascertain on an objective or principled basis what line distinguishes a given format from its neighbors, and at what point a change in programming may amount to a change of format for the purposes outlined in *WEFM*.⁴ Any second-guessing of licensee judgment would necessarily be highly subjective, and we are convinced that detailed governmental scrutiny into such matters would raise serious First Amendment problems.

12. The United Church of Christ, in its petition, characterizes the Commission's real motivation in pursuing a policy of not regulating format changes as "not so much based upon First Amendment consid-

⁴ In the *WEFM* case, the Commission was ordered to inquire into whether a station with a "fine arts" format was a reasonable substitute for the "classical" format which *WEFM* proposed to abandon. In a later decision by a panel of the D.C. Circuit, it was apparently assumed that these two formats involved in the *WEFM* case were the same as a practical matter. It was stated that "[a]t stake was a classical music format provided by only one other station in *WEFM*'s service area." *Home Box Office v. FCC*, — F.2d —, No. 75-1280 (D.C. Cir., March 25, 1977), slip opin. at 49 n.49. While the significance of this statement is unclear, we do not take it to mean that a station could change its format only if two reasonable substitutes would remain in the market.

erations as upon the fact that entertainment programming constitutes the licensee's revenue base and is, therefore, very sensitive indeed." (Pet., p. 35). In the context of making this point, UCC relies upon a statement of the *WEFM* court that we believe does warrant response. That is the somewhat rhetorical question posed by the Court:

Precisely why the balance [between free competition in broadcasting "and the reasonable restriction of that freedom inherent in the public interest standard]" should be struck with entertainment programming in one pan and everything else in the other is not clear. The Policy Programming Statement pays a great deal of attention to First Amendment considerations in justifying the FCC's non-interference in entertainment matters, but familiar First Amendment concepts would, if anything, indicate a lesser—not a greater—governmental role in matters affecting news, public affairs and religious programming.

506 F.2d at 267. The answer to that question, quite simply, is that the format regulation which seems to us to be demanded by *WEFM* would be enormously more intrusive into licensee decision making than the Commission's present involvement in the news and public affairs area. This implication of this argument, as amplified by the UCC, that the Commission "regulates" news and public affairs programming in a manner remotely resembling format regulation is plainly wrong. To the extent that the Commission exercises some direct control of programming,

it is primarily through the fairness doctrine and political broadcasting rules pursuant to Section 315. In both cases the Commission's role is limited to directing the licensee to broadcast some *additional* material so as not to completely ignore the viewpoints of others in the community. See, e.g., *Fairness Report*, 48 FCC 2d 1 (1974); *National Broadcasting Co. v. FCC* ("Pensions"), 516 F.2d 1101 (1974), *vacated*, 516 F.2d 1180 (1975), *cert. denied*, 424 U.S. 910 (1976); *Straus Communications, Inc. v. FCC*, 530 F.2d 1001 (1976). These regulations are extremely narrow, the Commission's role is limited by strictly defined standards, and the licensee is left with virtually unrestricted discretion in programming most of the broadcast day. In contrast, if the Commission were to assert the supervisory control of program formats required by *WEFM* and proposed by these petitioners, we would be faced with the prospect of rejecting virtually the entire broadcast schedule proposed by the private licensee, and it is not inconceivable that we could also be faced with directing a licensee to adopt a particular type of format, thus requiring him to broadcast all of his entertainment programming of a type he had not been broadcasting and that he did not desire to broadcast. While we would not argue that there are higher First Amendment values associated with entertainment as opposed to news and public affairs programming, the former is clearly within the Amendment's protection, and establishing a hierarchy of protections is a risky business. *Joseph Burstyn, Inc.*

v. Wilson, 343 U.S. 495 (1952); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). In view of our limited involvement in licensee decision making in the area of news and public affairs as compared to the pervasive, censorial nature of the involvement in format regulation that *WEFM* requires, we find nothing anomalous about the balance we have struck.

13. The petitioners raise a number of objections to the staff study which accompanied our Order and to certain aspects of the Order reached, in part, on the basis of that study. Specifically, they argue that the Commission cannot, on one hand, maintain that a free marketplace has afforded a wide array of program options, and then suggest that administrative law judges will not be able to assess the relative merits of preserving a "unique" radio format. We find nothing inconsistent with these conclusions. Data presented in Table 1 of Appendix B indicates the availability of a large number of clearly distinct radio formats in the 25 largest radio markets. Admittedly, the format classifications employed in the analysis are less specific than those which would be used for decisional purposes. However, more precise classification would only show a *wider* degree of format diversity than is indicated by the figures in Table 1. As we noted in the Opinion and Order, this conclusion is further evidenced by the analysis of the relationship between entertainment formats and audience shares. Wide variations in audience shares accruing to stations programming the same

type of format, suggest that listeners perceive significant differences between seemingly similar formats. The petitioners do not contest this point. They simply suggest that it has nothing to do with the relative values or intensity of preferences for different types of entertainment programs. The petitioners further contend that, if this is true, the staff's findings concerning the availability of radio programming should have had no bearing on the Commission's decision. We do not agree. Regardless of the pros and cons of format regulation, it is apparent that competitive forces at work in the largest radio markets have engendered a wide array of entertainment programs. We can only conclude that this particular criticism of the Commission's Opinion and Order has resulted from a misinterpretation of the staff study and our reliance on that analysis.

14. As noted in the Opinion and Order, format change proceedings will, among other things, necessitate that the hearing examiner determine: (1) what the station's existing format is; (2) whether there are any reasonable substitutes for that format in the station's market; and (3) if there are not, whether the benefits accruing to the public from the format outweigh the public detriment which the format abandonment would entail. The analysis of the relationship between format and audience shares bears on the first two issues. The staff's discussion regarding the lack of information on intensities of demand and the necessary lack of subsequent rational underpinnings

to format change decisions is pertinent to the third and decisive issue.

15. As noted above, the statistical analysis contained in Appendix B suggests that it will be no easy matter to define a station's format and to determine whether that format is unique. As noted, the analysis clearly demonstrates that audiences perceive many differences between seemingly similar formats. Hence, stations programming the same type of format may not be particularly good substitutes from the point of view of many, if not most listeners. Admittedly, this could be due to any number of factors including the musical tastes of particular audiences, the quality of the station's signal, the attractiveness of on-the-air personalities and so forth. Whatever the reason, the analysis indicates that the Commission will find it particularly difficult to determine whether there are reasonable substitutes for a station's existing and/or proposed format. Consequently, any decision to distinguish a particular format as being unique or having a good substitute will necessarily reflect the arbitrary perceptions of administrative law judges. There is simply no other means of reaching a decision of this nature unless both formats at issue are clearly identifiable and unique to a particular market. Unfortunately, this is seldom the case. Indeed, the question of whether a particular format is unique will largely depend on the ears of the beholder. The staff's analysis of formats and audience shares simply bears out this conclusion. It does suggest that reasonable definitions of formats will have to be much

more specific than those used in the analysis. However, as classifications become more precise, the Commission will find it increasingly difficult to evaluate the availability of close substitutes if more precise or specific format classifications are used to determine uniqueness. Indeed if the petitioners' criticism of overly broad format classifications used in the staff study were carried to their ultimate conclusions, every format available in a given market could probably be rationalized as being unique.

16. Again, we hasten to add that the statistical analysis presented in Appendix B only pertains to problems in assessing the uniqueness of radio formats. Assuming a format at issue is determined to be unique, the Commission would then be left to determine whether the public interest would be adversely affected by the proposed change. We have mentioned that the Commission is in no position to make this determination due to a lack of information on the intensity of preferences for various types of formats. The petitioners apparently believe that this problem can be overcome with the application of a little common sense. If this were so, we would gladly accept the challenge. However, given American people's disparate tastes and opinions regarding types of entertainment and the use of leisure time, we are fearful that one man's "common sense" solution will appear thoroughly nonsensical to others. This is precisely why the Congress and the courts have vested broadcasters, acting as public trustees, with the authority to identify and program to the tastes of their

audiences without undue interference from the federal government or from private groups demanding access to the airwaves in order to propagate their particular interest.

17. In conclusion, we remain convinced that program format regulation is an extremely complex and unwise affair. Nevertheless, we recognize the fact that our conclusions in this regard are fully subject to judicial review. For this reason, the implementation of our new policy will continue to be stayed until court review has been completed.

18. For the foregoing reasons, IT IS ORDERED, That the petitions for reconsideration are DENIED and that the effectiveness of our Order will continue to be stayed pending the final disposition of judicial review.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

SEPARATE STATEMENT OF
COMMISSIONER JOSEPH R. FOGARTY

In Re: Development of Policy concerning Changes
in the Entertainment Formats of Broadcast Stations,
Docket No. 20682, on Reconsideration.¹

I share the petitioners' deeply felt concern that the "mass audience" orientation of commercial broadcasting has a marked tendency to cater to breadth, rather than depth, of audience interest, and thereby may ignore and neglect significant minority needs and tastes. I also am of the view that this Commission has a clear role and responsibility to ensure "the maximum benefits of radio to all the people of the United States," *Citizens Committee to Save WEFM, Inc. v. FCC*, 506 F.2d 246, 268 (D.C. Cir. 1974), and that this role and responsibility cannot be abdicated, either in the news and public affairs or the entertainment programming areas.² Where the public stands to lose a "unique" program format which has been responsive to the tastes, needs, and interests of a substantial segment of the community, I believe the Commis-

¹ The initial decision in this proceeding was taken on July 28, 1976, before I joined the Commission.

² As the Supreme Court has clearly stated:

"It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . it is the right of the public to receive a suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

sion must take an extremely hard look at the potential loss to determine if it can be reconciled with the public interest in an overall diversity of programming sources or otherwise sanctioned in terms of competing or countervailing public interest or constitutional considerations.

While I am, therefore, in basic agreement with the policy thrust of the court's mandate in the format change cases, I also share many of the Commission's concerns with respect to the definitional and administrative difficulties which this agency may encounter in strictly adhering to that mandate. In particular, as more fully discussed at paragraphs 15 and 16 of the Commission's Order, strict adherence to the court's mandate might appear to require the most subjective and possibly arbitrary of administrative judgments as to what constitutes a "unique" format. The possible indices and arguments concerning "uniqueness" are virtually infinite, and unless this Commission is allowed sufficient leeway of judgment, we may be forced into a mode of analysis and decision which defies the practical limits of administrative law in favor of the vagaries of perceptual psychology and metaphysics.

I also recognize, as the Order herein argues, that full Commission implementation of the court's mandate may draw this agency too deeply into the review of particular program content thereby setting us on a collision course with the First Amendment. I share much of the Commission's hesitation, but hav-

ing raised this issue, I would defer its resolution to the judiciary.

For these reasons, I concur specially in the Commission's decision to the extent it respectfully seeks further judicial guidance as to the implementation of the mandate of the format change decisions.

APPENDIX F

Relevant portions of the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*, are reproduced below:

Section 3(h), 47 U.S.C. 153(h), provides:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 303(g), 47 U.S.C. 303(g), provides:

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 309(a), 47 U.S.C. 309(a), provides:

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon

examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 310(d), 47 U.S.C. 310(d), provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 326, 47 U.S.C. 326, provides:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 402(b), 47 U.S.C. 402(b), provides:

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

INSILCO BROADCASTING CORPORATION, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

Insilco Broadcasting Corporation, *et al.*,¹ respectfully petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment, entered June 29, 1979, in *WNCN Listeners Guild v. FCC*, No. 76-1692, which was decided

¹ Insilco Broadcasting Corporation, Insilco Broadcasting Corporation of Louisiana, Inc., Insilco Radio of Oklahoma, Inc., Insilco Broadcasting Corporation of Oklahoma, Inc., McClatchy Newspapers, Newhouse Broadcasting Corporation, Palmer Broadcasting Company, Plough Broadcasting Company, Inc. (The Insilco companies formerly were named Covenant Broadcasting Corporation, Covenant Broadcasting Corporation of Louisiana, Inc., Covenant Radio of Oklahoma, and KTOK Radio, Inc., respectively.) Petitioners are all broadcast licensees.

together with *Classical Radio for Connecticut v. FCC*, No. 76-1793, and *Office of Communication of the United Church of Christ v. FCC*, No. 77-1951. Petitioners intervened in support of the respondents in No. 76-1793 and participated as a party before the court of appeals. We understand that the Federal Communications Commission and the United States of America, the National Association of Broadcasters, the Columbia Broadcasting System, Inc., and the American Broadcasting Companies, Inc., are also petitioning for certiorari to review the court of appeals' decision.

OPINIONS BELOW

The court of appeals' opinion, FCC App. A,² has not yet been officially reported. The Federal Communications Commission's Notice of Inquiry, FCC App. C, is reported at 57 F.C.C.2d 580 (1976); its Memorandum Opinion and Order, FCC App. D, is reported at 60 F.C.C.2d 858 (1976) (the "*Policy Statement*"); and its denial of reconsideration, FCC App. E, is reported at 66 F.C.C.2d 78 (1977).

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979, FCC App. B. On September 21, 1979, Mr. Chief Justice Burger signed an order extending the time for filing this petition to November 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

² As noted above, the Federal Communications Commission and the United States of America have petitioned for a writ of certiorari to review the court of appeals' decision. The opinions below are included in the Appendix to the government's petition and are cited here as "FCC App."

QUESTIONS PRESENTED

This case involves a decision by the court of appeals requiring the Federal Communications Commission (the "Commission") to intervene in selected cases when radio broadcasters change their program formats. The questions presented are:

1. Whether the court of appeals ignored this Court's repeated instructions and improperly substituted its own policy mandating radio format regulation for the Commission's expert determination that format regulation is impractical and unnecessary to serve the public interest.
2. Whether the court of appeals' insistence on Commission oversight of radio format decisions ignores First Amendment considerations, explicated in this Court's decisions on access to broadcast facilities and on "less drastic means," thus upsetting the delicate constitutional balance required of all regulation touching program content.
3. Whether the court of appeals ignored important legislative history in erroneously deciding that the Communications Act mandates Commission regulation of radio formats.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sections 309(a) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(a) and (e), provide:

"(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register.

Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission."

Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §310(d), provides:

"(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. §326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no

regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Sections 396(a)(1), (3) and (5), and (g)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. §396(a)(1), (3) and (5), and (g)(1)(A), provide:

"(a) The Congress hereby finds and declares that—

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

(3) expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;

(5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence. . . .

(g)(1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to—

(A) facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made

available to public telecommunications entities, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature. . . ."

STATEMENT OF THE CASE

This case presents a conflict over the regulatory policy that the Federal Communications Commission must follow whenever a radio station seeks to change its entertainment format in the face of opposition from members of the public. Intertwined with this issue are basic questions concerning the Commission's legislative role in formulating regulatory policy and the scope of the court of appeals' policy review. Significant interpretations of the Communications Act of 1934 and of the First Amendment are integral to these questions.

Commercial and noncommercial radio stations compete for listeners by broadcasting music and informational programs in different combinations. The precise mix of program material, performers and method of presentation is unique to each station. Most adjust their selection of program material in order to respond to the desires of the listening audience, and various groups within it, for particular music and information. The radio marketplace is dynamic, responding to constantly changing listeners' preferences.

No precise definition of a radio "format" exists. Indeed, the elusiveness of the term "format" lies at the center of this case. Virtually any of the definitions favored by the Commission, the court of appeals or the litigants in this proceeding use highly subjective terms and widely different schemes for classifying different combinations of music and informational programming.

For many years radio stations changed their programming at will, in mid-license or in connection with a change of ownership, without interference from the Commission or courts. However, beginning in 1970, audience groups challenged licensees' format changes in a series of cases at the Commission and the United States Court of Appeals for the District of Columbia Circuit.³ The cases culminated in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*), in which the court of appeals consolidated its previous format decisions and established guidelines for the Commission's consideration of future disputed format changes.

In *WEFM* the court of appeals concluded that the "public interest, convenience, and necessity" standard⁴ of the Communications Act requires the Commission to intervene when a proposed transferee of a radio station contemplates abandoning a so-called "unique" format. To vindicate this implied concern for diverse entertainment programming, the court required the Commission to consider the net loss of diversity in situations where a format was to be abandoned in the face of significant "public grumbling."⁵ The court insisted the Commission consider whether an adequate substitute for the format existed, and whether the format could be maintained economically

³ *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970). See also *Hartford Communications Comm. v. FCC*, 467 F.2d 408 (D.C. Cir. 1972).

⁴ This is the standard prescribed in Section 309(a) of the Communications Act, 47 U.S.C. §309(a).

⁵ 506 F.2d at 261.

in the market.⁶ Economic feasibility was not to be measured simply by the economic performance of the station and format in question; rather the inquiry extended to whether the station was efficiently managed and, if not, whether a better managed station would make money using that format.

If a substantial question of fact existed with respect to these considerations, the Commission was to hold an evidentiary hearing. A hearing was also necessary if any element of the court of appeals' test was established. For example, if a station proposed to abandon its format and no other station in the market offered "a reasonable substitute," then a hearing was necessary to determine whether abandoning the format in that market comported with the public interest.⁷

Following the decision in *WEFM*, the Commission issued a notice of inquiry⁸ to explore adopting a comprehensive policy for radio format changes to replace the case-by-case development to that point. The Commission was frankly concerned with the practical difficulties of implementing *WEFM* in a sensible way, and with the likelihood that even vigorous implementation would be of little value to the "public interest" as the Commission perceived it. The Commission was also gravely worried about constitutional difficulties that seemed to pervade the court of appeals' approach.

After comments and replies were received the Commission issued the *Policy Statement*,⁹ announcing that it would no longer intervene to block format changes. The Commission concluded that classifying radio program-

⁶ *Id.* at 262, 264-266.

⁷ *Id.* at 264-65.

⁸ FCC App. C.

⁹ FCC App. D.

ming in categories—whether relatively broad or narrow—was of little value. Comments, supported by a Commission staff study, showed that any format classification system was largely arbitrary, and that listeners apparently perceived as much difference between stations within the same format category as they did between stations in different categories.¹⁰

The Commission could not discover any consistent way to measure differences in the intensity of audience preferences for various formats. Therefore it could not determine a net public interest gain or loss resulting from the replacement of one format by another.¹¹

The Commission found that the marketplace was already providing great diversity of program service throughout the country. Minority groups—whether defined by age, economic status, education or race—are not guaranteed tailor-made service in a particular area. But no such guarantees are possible. If a format appeals to one group, then other groups in the same market are probably unserved or underserved to some degree. The Commission also concluded, relying in part on this Court's interpretation of the Communications Act in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940), that Congress intended radio broadcasting to be governed by the marketplace.¹²

On review *en banc*, the court of appeals invalidated the Commission's policy of not interfering in radio licensees' format decisions. The court held that the Commission could not formulate a new regulatory approach to format changes because of the earlier decision in *WEFM*.¹³ It was

¹⁰ FCC App. D 129-30a.

¹¹ FCC App. D 129-30a.

¹² FCC App. D 122-24a.

¹³ FCC App. A 40a.

unconvinced by the attempted distinction between its case-by-case approach to formats and the Commission's reexamination of the whole area as part of its "basic legislative mandate":¹⁴

We should have thought that *WEFM* represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court of Appeals, and as it is to be administered by the Commission

WEFM was an interpretation of a statute applicable to an adjudicatory proceeding and, to this extent, was a decision in which the judicial word is final. That decision was based on an interpretation of the Communications Act.¹⁵

The court found the Commission's analysis flawed, and advanced its own "common sense"¹⁶ approach to format regulation as more authoritative. The court in effect also modified *WEFM* by explaining that administrative oversight of format changes was intended to be a supplement to the market's influence on formats, not a substitute. Commission intervention in disputes over format changes was only necessary, according to the court, "when there is strong *prima facie* evidence that the market has in fact broken down."¹⁷

The court of appeals was sanguine about the efficacy of administrative format regulation because most prior format disputes have been settled rather than fully litigated.¹⁸ The court apparently did not recognize the likeli-

¹⁴ FCC App. D 119a.

¹⁵ FCC App. A 32-33a (emphasis in original).

¹⁶ FCC App. A 37a.

¹⁷ FCC App. A 24a.

¹⁸ FCC App. A 18-20a, 25a.

hood that the expense and delay of litigation, which prompted the need for settlement, deterred licensees' freedom of choice in selecting program content and deprived listeners of the benefits of programming selected through the marketplace rather than by government fiat.

The court gave little attention to arguments that Commission oversight of formats was contrary to the legislative history of the Communications Act,¹⁹ that it violated the First Amendment as applied to broadcasting,²⁰ and that the court's rejection of the *Policy Statement* exceeded its powers of review as explained in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (hereafter "*NCCB*"). The court of appeals also criticized the Commission's rationality and impartiality in issuing the *Policy Statement*. The court was particularly aggravated by the Commission's reliance on a staff study that the court felt had not been made available at a sufficiently early stage for adversarial comments. The court also was unconvinced by the study's statistical analysis.²¹

Judge Tamm, joined by Judge MacKinnon, dissented on the ground that the majority was substituting its policy preference on a judgmental or predictive matter in violation of the mandate of *NCCB*.²² Judge Tamm agreed with the Commission that "unique" formats could not adequately be distinguished from "non-unique" formats (a major point in the Commission's *Policy Statement*),²³

¹⁹ FCC App. A 26-27a, n.37.

²⁰ FCC App. A 33a.

²¹ FCC App. A 14-17a.

²² FCC App. A 55a.

²³ FCC App. A 50-51a.

and that the Commission could not reliably measure audience preferences for different formats.²⁴

In a separate opinion, Judge Bazelon concurred on the ground that the Commission had not made its staff study available for public comment sufficiently early in the rule making below.²⁵ However, he carefully noted his general agreement on the merits with Judge Tamm's dissent, and he criticized the majority for failing "to grapple seriously with the constitutional implications of its decision."²⁶

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the District of Columbia Circuit—the sole reviewing court of most Commission decisions²⁷—has established a regime that departs strikingly from Congress' plan to delegate its regulatory authority over radio broadcasting to the Commission and to leave program decisions to market forces. The opinion below will require governmental intervention in decisions concerning program content on radio to an extent inconsistent with the First Amendment as construed by this Court. Consequently, the case presents important statutory and constitutional questions affecting an industry which reaches most citizens of the United States.

²⁴ FCC App. A 51-53a.

²⁵ FCC App. A 41a.

²⁶ FCC App. A 41-42a.

²⁷ This court of appeals' exclusive jurisdiction to hear appeals of Commission orders relating to the licensing of broadcast stations is provided by Section 402(b) of the Communications Act, 47 U.S.C. § 402(b).

I. The Court of Appeals Has Disregarded The Clear Instruction of This Court and Has Impermissibly Substituted Its Judgment for That of The Commission in Policy Matters Which The Congress Has Entrusted to The Special Expertise of The Agency.

This is the third in a series of cases in which the court of appeals has substituted its own policy judgments on the regulation of broadcasting for those of the Commission. Although the court of appeals' scope of review was defined in *NCCB* and *CBS v. Democratic National Committee*, 412 U.S. 94 (1973) (hereafter "*DNC*"), the court insists upon its own predictions and judgments about the nature and importance of diversity in the radio marketplace, and disdains those of the Commission. This distorts the relationship between a major regulatory agency and its reviewing court, depriving the Commission of the flexibility it needs to fulfill the role assigned by Congress.

The court orders the Commission to consider "loss of diversity,"²⁸ even though the Commission disclaims the ability to perform that analysis rationally. The court also orders the Commission to judge whether certain formats are "unique" in particular markets, even though the Commission says it lacks this predictive capacity.²⁹ Just a year after this Court's opinion in *NCCB*, the court below insists on retaining a judicial picture of diversity thoroughly at odds with the Commission's view of the broadcast marketplace. The opinion below and *NCCB* cannot stand together.

In *NCCB* the same court of appeals had overturned portions of the Commission's rule making on newspaper-broadcast cross-ownership, an area (like the present case) where Congress delegated "broad authority to the Commission to allocate broadcast licenses in the 'public inter-

est.'"³⁰ The court had substituted its judgment for the Commission's on the importance of diversity of media cross-ownership, and imposed a more stringent policy requiring divestiture of certain cross-owned properties. This Court forcefully disagreed, holding that Congress committed "the weighing of policies under the 'public interest' standard"³¹ to the Commission, which was entitled to give greater force to best practicable service than to diversity of ownership.³²

In reinstating the Commission's policy in its entirety, this Court looked to whether the Commission had been arbitrary or capricious in failing to proceed rationally or in not considering the relevant factors. This Court stressed that judicial review, while it must be "searching and careful," does not empower a court "'to substitute its judgment for that of the agency.'"³³

NCCB is a striking parallel to the present case. The Commission here developed a full record on radio formats, found facts and made a "legislative-type" judgment³⁴ that leaving format decisions to broadcasters, subject to market forces, is the most effective means of achieving an acceptable level of program diversity under the public interest standard. The Commission reached its conclusions through a rational process and thoroughly explained its reasoning. As in *NCCB*, the subject of radio format diversity involves factual determinations primarily of a judgmental or predictive nature, where complete factual support in the record is neither possible nor

³⁰ 436 U.S. at 795.

³¹ *Id.* at 810.

³² *Id.*

³³ *Id.* at 803, quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

³⁴ *Cf. Davis, Administrative Law of the Seventies* 146 et seq. (1976) (distinguishing legislative from interpretive rules).

²⁸ FCC App. A 5a.

²⁹ FCC App. A 30-31a.

required, for " 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " ³⁵

A similar parallel is found in *DNC*, where this Court overturned the same court of appeals' conclusion that the public interest standard of the Communications Act required a right of access by non-licensees for editorial advertisements dealing with public issues. This Court held that Congress left such basic policy questions to the Commission to give it the flexibility for experimenting "with new ideas as changing conditions require," and to balance the asserted benefits of regulatory intervention against its undesirable effects. ³⁶

Deference to the Commission's legislative fact-finding and inferential reasoning is long-standing. ³⁷ Any other approach would fossilize the regulatory framework of broadcasting despite constantly changing market and technological conditions. For example, the Commission has issued a notice of proposed rule making that contemplates deregulating many aspects of radio broadcasting. ³⁸ A quantum reduction in these regulations has been studied for some time, and the Commission may well decide that the public interest would best be served by allowing market forces greater play. Since entertainment formats are the essence of radio broadcasting, any court-developed policy requiring the Commission to monitor format changes, and approve those in dispute, would jeopardize the Commission's ability to conform its regulatory scheme to changing conditions. The court's decision

³⁵ 436 U.S. at 814, quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

³⁶ 412 U.S. at 122-23.

³⁷ See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943).

³⁸ *Deregulation of Radio*, 44 *Fed. Reg.* 57636 (October 5, 1979).

below is therefore a potential impediment to a wide range of regulatory goals.

II. The Court of Appeals Has Ignored Applicable Decisions of this Court And Decided an Important Constitutional Question in a Manner Directly at Odds With The Requirements of Those Decisions.

The court of appeals' doctrine of program diversity and format regulation fundamentally conflicts with two lines of cases on the First Amendment decided by this Court. The court below made no attempt to square format regulation with the First Amendment, and a major constitutional misinterpretation will be perpetuated absent guidance from this Court.

Formats are the framework for expression in the radio medium. Format decisions attempt to maximize audience in order to increase the impact of editorials, news and public affairs programming, and to increase the public's exposure to ideas expressed in music or humor. A format is itself a form of expression, in the same way that an anthology is the expression of the editor, or as the selection of news stories constitutes expression by a newspaper publisher.

The court of appeals desires to promote radio service for various tastes that it feels may be underserved. But government attempts to measure public benefit or detriment as to matters of taste—intangibles which are unresolvable in a hearing and unquantifiable by administrative or judicial process—raise serious First Amendment questions.

Under these circumstances, the Court's doctrine of "less drastic means," ³⁹ provides essential guidance for

³⁹ See *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960).

harmonizing First Amendment doctrine generally with regulatory approaches in the broadcast format area. Achieving legitimate governmental goals (such as promoting the public interest in broadcasting),

cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose.⁴⁰

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the governmental interests were examined to determine their legitimacy and importance. Then, particular means of promoting those interests were weighed against impairment of First Amendment rights, considering alternatives with less adverse impact.

Analyzing format regulation in this way highlights the flaw in the court of appeals' approach. Diversity of service is a legitimate goal under the public interest standard, but it can be achieved with far less intrusion on protected rights. In fact, Congress and the Commission have already provided these alternatives.

Congress decided to achieve diversity in entertainment programming primarily through the marketplace. Congress' primary reliance on market forces to achieve program diversity was an important element in *Sanders Brothers*.⁴¹ The Commission's *Policy Statement* concluded that the market continues to be the most effective means of achieving this aim.⁴²

⁴⁰ *Shelton v. Tucker*, *supra* n.39, 364 U.S. at 488 (footnotes omitted).

⁴¹ *FCC v. Sanders Brothers Radio Station*, *supra*, 309 U.S. 470 (1940).

⁴² FCC App. D 128a.

Congress has supplemented commercial radio service by enacting legislation to establish noncommercial ("public") radio stations throughout the country for the express purpose of encouraging programming to serve diverse cultural needs.⁴³ Noncommercial radio is fulfilling the expectation that it can present programming which appeals to small audience groups and is therefore unlikely to be presented by commercial radio.⁴⁴ This supplementary role of noncommercial radio stations is growing more sophisticated each year.⁴⁵ To the degree that entertainment and informational programming overlap, such as on "all news" stations, the Fairness Doctrine is also a less drastic means to diversity, because the Doctrine accords great scope to licensees' editorial judgments and permits Commission oversight only in very limited circumstances.⁴⁶

Consideration of the Fairness Doctrine also leads directly to the second line of cases that conflict with the court of appeals' holding below. In *Red Lion* and *DNC*, this Court struck a delicate balance between vindicating the

⁴³ See Educational Television Facilities Act of 1962, Pub.L.No. 87-447, 76 Stat. 64, as amended by Public Broadcasting Act of 1967, Pub.L.No. 90-129, 81 Stat. 365, 367, and by Educational Broadcasting Facilities and Telecommunications Demonstration Act of 1976, Pub.L.No. 94-309, 90 Stat. 683 (codified at 47 U.S.C. § 390, *et seq.*). See also Sections 396(a)(1), (3), (5) and (g)(1)(A) of the Communications Act, 47 U.S.C. § 396(a)(1), (3), (5), (g)(1)(A).

⁴⁴ Congress was straightforward in its finding: that it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence. . . . 47 U.S.C. § 396(a)(5) (1978).

⁴⁵ See *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* 185 *et seq.* (1979).

⁴⁶ See *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969) (hereafter "*Red Lion*").

audience's right to receive "suitable access to social, political, esthetic, moral and other ideas and experiences,"⁴⁷ and "the risk of an enlargement of Government control over the content of broadcast discussion of public issues," which a right of editorial access would have required.⁴⁸

The notion that courts, acting through the Commission, can manipulate formats to assure access for all major aspects of contemporary culture is a close cousin to the theory of editorial access in *DNC*. Both require detailed bureaucratic second-guessing of program decisions. This Court said in *DNC*: "[t]o sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result."⁴⁹

Red Lion and *DNC* are therefore consistent with the "less drastic means" cases. They fortify the conclusion that Congress has selected marketplace forces supplemented by noncommercial radio and, in certain instances, the Fairness Doctrine, to achieve program diversity. The Commission confirms that this approach is more effective than intervention in format decisions. Therefore, the decision below is incompatible with this Court's cases applying the First Amendment to the field of broadcasting.

III. The Court of Appeals Has Failed to Consider Legislative History of the Communications Act Which is Dispositive of The Issues Arising in This Case.

A striking feature of the decision below is the court's general avoidance of legislative history to support the need for radio format regulation to achieve diversity. The

⁴⁷ *Id.* at 390.

⁴⁸ *DNC*, 412 U.S. at 126.

⁴⁹ *Id.* at 127 (footnote omitted).

legislative histories of Sections 326⁵⁰ and 310(d)⁵¹ actually foreclose the Commission's authority to intervene in broadcasters' format decisions, and the court's misconstruction of the Act threatens to govern all radio broadcasting unless this Court intervenes.

Section 326, which prohibits the FCC from censorship, was enacted in part to prevent the Commission from granting licenses according to priorities based on broadcast content (such as the kind of music to be played).⁵² Section 310(d) of the Act was passed to forbid the Commission from interfering in the sale of a broadcast station by comparing the proposed buyer's qualifications—including his programming proposals—with those of any other party, including the existing licensee.⁵³ Although the court of appeals interpreted Section 310(d) as not forbidding program service comparisons between the buyer and seller⁵⁴ (an interpretation that the Commission itself adopted in an earlier case),⁵⁵ this is an erroneous reading of the pertinent legislative history.⁵⁶

⁵⁰ 47 U.S.C. §326.

⁵¹ 47 U.S.C. § 310(d).

⁵² See H.R. Conf. Rep. No. 1886, 69th Cong., 2d Sess. 19 (1927), relating to Section 29 of the Radio Act of 1927, Pub.L.No. 632, ch. 169, 44 Stat. 1162, the predecessor of Section 326 of the present Act.

⁵³ H.R. Rep. No. 1750, 82d Cong., 2d Sess. 245-46, *reprinted* in 1952 U.S. Code Cong. & Ad. News 2245-46 (discussing Section 310(b) of the Act, which was recodified as Section 310(d), Pub.L. 93-505, § 2, 88 Stat. 1576).

⁵⁴ FCC App. A 26-27a, n.37.

⁵⁵ *Wichita-Hutchinson Co.*, 20 F.C.C.2d 584, 586 (1969).

⁵⁶ H.R. Rep. No. 1750, 82d Cong., 2d Sess. 245-46, *supra* n.53.

CONCLUSION

For the above reasons, certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

AMERICAN BROADCASTING COMPANIES, INC., CBS INC.,
 METROMEDIA, INC. and NATIONAL RADIO
 BROADCASTERS ASSOCIATION,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI
 TO THE UNITED STATES COURT OF APPEALS
 FOR THE DISTRICT OF COLUMBIA CIRCUIT

American Broadcasting Companies, Inc., CBS Inc., Metromedia, Inc. and the National Radio Broadcasters Association hereby jointly petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment of June 29, 1979, in *WNCN Listeners Guild v. Federal Communications Commission*, Nos. 76-1692, 76-1793 and 77-1951.

We understand that the Federal Communications Commission and the United States are also petitioning for certiorari to review the court of appeals' decision.

OPINIONS BELOW

The opinion of the court of appeals, not yet officially reported, appears as Appendix A of the petition of the Federal Communications Commission and the United States.¹ The opinions of the Federal Communications Commission are reported at 60 FCC 2d 858 (1976) and 66 FCC 2d 78 (1977) and appear as Appendices D and E, respectively, of the Government's petition.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. On September 21, 1979, the time for filing this petition was extended to November 26, 1979, in an Order signed by Mr. Chief Justice Burger. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Since the very beginning of broadcast regulation the selection of the informational and entertainment program formats of radio broadcast stations has been entrusted to individual licensee discretion, responding to the needs of the listening audience and the competitive conditions of the marketplace. Following a comprehensive policy and fact-finding inquiry, the Commission determined that public interest and First Amendment goals would be best served by maintaining this long-standing regulatory approach.

The question presented is whether, by ordering the Commission to regulate in this area, the court of appeals acted contrary to the purposes of the Communications Act, usurped the Commission's administrative discretion,

¹ References to the court of appeals' opinion will be cited herein to the material appended to the Government's petition, as "FCC App. A at —."

and mandated a form of regulation that violates the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 3(h), 303(g), 308, 309(a), 310(d), 315(a), 326 and 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(h), 303(g), 308, 309(a), 310(d), 315(a), 326 and 402(b). These constitutional and statutory provisions are set forth in an Appendix to this petition.

STATEMENT OF THE CASE

This case concerns the extent to which the Government should regulate changes in the program content of individual radio station licensees. The material selected and the manner in which such material is presented constitute a station's program format, which is utilized to attract and maintain listeners.² The selection and implementation of program formats is a dynamic process:

"Radio station formats are infinite in variety and subject to constant reappraisal and change. A *formula* that stresses progressive rock music today may, by a quick decision of the programmer, feature rhythm and blues music tomorrow. A different announcer or staff of announcers can change the personality of a station almost overnight. A changed configuration of news programs on a given station may suddenly change that station's total impact on an audience. Format changes are frequently made on

² The dramatic growth in the number of radio stations (from 583 in 1934 to 8,654 in 1979) and the concomitant surge in radio specialization has produced a great number of different entertainment and informational formats. See *Inquiry and Proposed Rule-making: Deregulation of Radio*, 44 Fed. Reg. 57,636, 57,646-48 (1979).

the basis of educated hunches, abstract guesses, competitive station activities, and mere whims.”³

This case also involves sharp and continuing policy differences between the lower appellate court and the Federal Communications Commission.

Over the course of more than forty years of broadcast regulation, the artistic and journalistic content of individual station program formats was entrusted to licensee discretion and marketplace conditions. Indeed, no rule or general policy was ever promulgated by the Commission to regulate radio program formats. This pattern and practice was pierced, however, by a series of adjudicatory decisions that commenced in 1970⁴ and culminated four years later in an *en banc* decision of the Court of Appeals for the District of Columbia Circuit in *Citizens Committee to Save WEFM v. FCC*, 165 U.S. App. D.C. 185, 506 F.2d 246 (1974) (hereinafter “*WEFM*”). Applying general statutory language from the Communications Act of 1934—i.e., the “public interest” standard of Sections 309(a) and 310(d) and the general provision of Section 303(g) authorizing the agency to “encourage the larger and more effective use of radio . . .”—the *WEFM* court directed the Commission to reverse its historical course and to begin active over-

³ E. ROUNT, J. MCGRATH, & F. WEISS, *THE RADIO FORMAT CONUNDRUM*, p. 1 (1978) (emphasis in original). While a station's initial format is usually developed to fill a specific programming void in a particular radio market, “once the decision has been made to program contemporary music, country music, ethnic music, all-news, all-talk or adult music, the format may, and likely will, be subjected to a dozen subtle or obvious shifts and adjustments.” *Id.*

⁴ *Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970); *Hartford Communications Comm. v. FCC*, 151 U.S. App. D.C. 354, 467 F.2d 408 (1972); *Lakewood Broadcasting Serv., Inc. v. FCC*, 156 U.S. App. D.C. 9, 478 F.2d 919 (1973); *Citizens Comm. to Keep Progressive Rock v. FCC*, 156 U.S. App. D.C. 16, 478 F.2d 926 (1973).

sight of format changes in license assignment situations. Under *WEFM*, when the Commission is faced with an assignment application that includes a proposed change in program format, and there is significant public grumbling, it must determine whether the format to be altered is unique or otherwise serves a specialized audience that would somehow experience its loss. If the so-called “endangered” format fits this description, the Commission must conduct a public inquiry (which may include a full-scale evidentiary hearing) for the purpose of determining whether proposals to change the program format of the radio station being assigned would be consistent with the public interest.

Agency Proceedings

Because all previous decisions leading to *WEFM* had occurred in an adjudicatory context that did not permit an opportunity to explore general marketplace conditions and the First Amendment consequences of format regulation, the Commission initiated a general public inquiry on December 22, 1975. This was, therefore, the Commission's first comprehensive review of the various practical and policy facets involved in the direct and detailed regulation of radio station entertainment and informational formats.

In July 1976, after reviewing comments from numerous broadcasters and public interest representatives, the Commission issued a policy statement, *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C. 2d 858 (1976) (“*Policy Statement*”), which concluded that the regulation of programming required by *WEFM* was inconsistent with the policy Congress had adopted for broadcasting under the Communications Act of 1934, presented insoluble practical application problems, and represented an impermissible intrusion into programming practices protected by the First Amendment. Moreover, the Commission found compelling evidence that a highly

competitive radio marketplace was producing substantial programming diversity without regulatory intervention.

The Decision Below

This petition seeks review of an *en banc* decision of the court of appeals holding that the Commission's 1976 *Policy Statement* is "unavailing and of no force and effect." (FCC App. A at 40a). Judge McGowan, writing for the majority, reaffirmed the court's *WEFM* holding that the Commission must scrutinize proposed format changes in transfer applications. Relying on the same broad "public interest" statutory language cited in *WEFM* (but not on Section 303(g)), the majority opinion below also substantially broadened *WEFM* by requiring that the same format policy be applied to license renewal applications (FCC App. A at 20a).

The majority opinion was critical of the Commission for having challenged the court's statutory interpretation, and denied that the court of appeals was making agency policy. While acknowledging that the Commission possessed a special expertise concerning the intricacies of radio broadcasting and was better equipped to develop legislative-type facts concerning the radio marketplace (FCC App. A at 27a, 34a), the court nevertheless engaged in its own policy analysis to determine whether competition among radio stations would provide program diversity as well or better than government regulation.³

³ With respect to the Commission's general examination of marketplace conditions, the court admonished the agency for not specifically providing an opportunity for public comment on one aspect of that examination—a statistical table developed by the Commission's staff from widely available trade sources that set forth the number of radio stations utilizing certain format categories in the 25 largest metropolitan markets. The court, however, specifically declined to reject the Commission's *Policy Statement* on this ground (FCC App. A at 17a n.24), and did not remand this matter to the agency for further proceedings.

Throughout its opinion the court of appeals repeatedly chastised the Commission for its "deep-seated aversion to the decisions of this court (and to the advocates of those decisions)"; its "less than enthusiastic cooperation" (FCC App. A at 21a); its desire to achieve a "circumvention" of the court's *WEFM* decision (FCC App. A at 22a); and its "history of at least passive resistance to the format decisions in the name of licensee freedom." (FCC App. A at 34a n.51). Evidently the court of appeals believed that all of the issues had been settled by its previous decisions, even though the constitutional issues had not even been briefed or argued.

Finally, in dismissing the Commission's analysis of the administrative difficulties and sensitive First Amendment concerns as "little more than a dream" (FCC App. A at 18a) and a "highly-colored portrait" (FCC App. A at 24a), the court sharply criticized the Commission for failing to develop administrative standards that would minimize the intrusive features of *WEFM* (FCC App. A at 27a).

In a concurring opinion, Judge Bazelon expressed concern that the majority opinion hampered the Commission's legitimate policy-making role and failed to "grapple seriously" with the constitutional implications of its holding. (FCC App. A at 42a). In a dissenting opinion, Judge Tamm, joined by Judge MacKinnon, declared that the majority's decision "usurps the proper role of the Federal Communications Commission . . . in the formulation of communications policy." (FCC App. A at 46a). Citing several instances where, in its view, the majority had substituted its own radio marketplace theories for Commission findings, the dissenting opinion concluded that, by disregarding the Commission's expert knowledge and policy-making role, the majority decision below violated this Court's mandate in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

REASONS FOR GRANTING THE WRIT

This is the fourth major case to come before this Court in the past decade concerning FCC regulation in the sensitive area of program content. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court upheld the constitutionality of the Commission's fairness doctrine and personal attack rules. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) ("*CBS v. DNC*"), the Court reversed a decision of the District of Columbia Circuit finding that the Commission was required to establish regulations permitting "access" for editorial advertising. This Court held that neither the Communications Act nor the First Amendment required the Commission to engage in such regulation, and recognized the fundamental principle that broadcast licensees, not the Commission, are charged with the task of selecting broadcast programming.⁶ In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), while ruling that the FCC could properly prohibit the broadcast of repeated indecent language in the early afternoon hours on radio, the Court made clear again that more extensive regulation of program content raises the most serious First Amendment questions.

The present case again involves the necessity and appropriateness of Commission regulation of licensee program choice. The fundamental question presented is whether the Commission is required to regulate changes in radio formats or whether it may leave such decisions to individual station licensees acting as public trustees. Thus, the present case, like *CBS v. DNC*, involves the question of whether the Court of Appeals for the District of Columbia Circuit properly ordered the Commission to engage in program content regulation, when the Com-

⁶ In *FCC v. Midwest Video Corp.*, — U.S. —, 99 S. Ct. 1435 (1979), the Court made clear that such regulation would not be permissible under the Communications Act.

mission determined that such regulation would be contrary to the Communications Act and the First Amendment.

Unquestionably, the decisions of the court of appeals requiring such regulation represent a radical departure from traditional standards. As the Commission has observed, "[f]or over forty years broadcasting applicants have been free to select their own program formats."⁷ Consistent with that tradition and based on its long experience in administering the governing statute, the Commission has concluded that regulation of radio formats would be contrary to both the purposes of the Communications Act and the First Amendment because it would deprive licensees of the opportunity to determine what programming best serves the interests of the listening audience.⁸ The court of appeals substituted its policy judgment for that of the Commission with respect to the need to undertake regulation of radio program formats without any statutory support except the court's invocation, as a talisman, of the Communications Act's concern for the "public interest." In reprimanding the Commission for its "deep-seated aversion"⁹ to the recent decisions of the court of appeals, the court below failed to give adequate weight to the Commission's interpretation of the public interest standard.¹⁰ As this Court stated in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), "the weighing of policies under the

⁷ *Notice of Inquiry: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C. 2d 580, 585 (1976).

⁸ *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C. 2d 858 (1976).

⁹ FCC App. A at 21a.

¹⁰ As this Court has repeatedly held, the long-standing construction of a statute by an agency charged with its execution is entitled to great weight. See *Red Lion*, 395 U.S. at 381; *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965); *Udall v. Tallman*, 380 U.S. 1, 16-18 (1965).

'public interest' standard is a task that Congress has delegated to the Commission in the first instance" ¹¹

The statutory and constitutional questions presented in this case are important to the future of broadcast radio. In order to compete most effectively and to respond to the changing demands of their audience, individual broadcasters often change their formats—such as from classical to popular, from one type of popular music to another, or from an entertainment format to all-news radio.¹² The court of appeals' decision makes clear that the regulatory requirements which it imposed are applicable to format changes occurring either when a license is assigned or when the existing owner makes a judgment that his audience would be better served by a different format and this change is placed in issue at renewal time.¹³ Thus, this case involves the standards applicable to all changes in broadcasting formats undertaken by radio licensees.

The court of appeals' decision is also important because it could hamper the Commission's efforts to "deregulate" broadcast radio. For several years the Commission has raised the question of whether its regulatory activities

¹¹ 436 U.S. at 810.

¹² As noted above, such shifts are accomplished not only by discrete and clearly perceptible format revisions, but also by gradual shifts in talent or content within particular programs or blocks of time.

¹³ FCC App. A at 20a. The court below attempted to minimize the scope of that decision by averring, for example, that the *WEFM* policy does not allow the Commission to "dictate adoption of a new format [or] force retention of an existing format. . . ." FCC App. A at 25a-26a. There can be no question that the decision under certain circumstances would "force retention of an existing format. . . ." Moreover, there is reason to believe that logically, at least, it may extend even further. For instance, while neither the Commission nor the court of appeals addressed the question, the logic of the court's decision might require that a new applicant proposing a unique format be given preference over an existing licensee offering a non-unique format.

in broadcast radio are justified, particularly in light of the large number of radio broadcast stations which exist throughout the United States. The culmination of the Commission's consideration of this issue has been a recent notice of proposed rulemaking initiating a proceeding which is likely to continue for several years.¹⁴ There, the Commission proposes to eliminate virtually all agency standards as to the overall quantities of news, information and advertising matter broadcast by radio licensees.¹⁵ The Commission's basic deregulation theory, like the theory of its format policy, is that the marketplace provides adequate incentives and restraints to promote diversity. The decision of the court of appeals may well be urged to cast doubt upon the Commission's ability to consider fresh regulatory alternatives in the radio broadcast area, or to place reliance on the operation of the market.

The questions presented in this case are unlikely to arise in any other circuit. Since the licensing decisions affected by the court's policy can only be appealed to the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), it is highly unlikely that any other court of appeals will be able to consider the issues in this case, and thus there is no significant possibility of a conflict in the circuits that could generate further review by this Court.

Finally, the case is important because the decision below reflects a continuing misunderstanding by the court of appeals of the regulatory responsibilities of the Federal Communications Commission, a misunderstanding

¹⁴ *Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636 (1979).

¹⁵ The Commission does not propose to eliminate the fairness doctrine or the political broadcasting rules as applied to radio.

which was also reflected in the court of appeals' decisions in *CBS v. DNC* and in *NCCB*.¹⁶

We briefly discuss below the error of the court of appeals' ruling, and other reasons why this Court should grant certiorari.¹⁷

I. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT STATUTORY QUESTION WHICH HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Unlike the fairness doctrine upheld by this Court in *Red Lion Broadcasting Co. v. FCC*, which originated with the Commission and is specifically prescribed by the Com-

¹⁶ *National Citizens Comm. for Broadcasting v. FCC*, 181 U.S. App. D.C. 1, 555 F.2d 938 (1977), *rev'd*, 436 U.S. 775 (1978).

¹⁷ As discussed in note 5, *supra*, the court of appeals criticized the Commission for its reliance on a staff study depicting the degree of diversity in broadcasting because the study was not made available for comment. The court, however, did not rely on this alleged error as a ground for reversing the Commission and did not remand to the agency in order to cure the procedural defects it detected. In any event, the alleged procedural defects regarding the staff study would not have been sufficient to warrant the court of appeals' rejection of the *Policy Statement*. No one has advanced any substantive objections to the study or explained how such objections might have dissuaded the Commission from relying on the study. In one of the cases relied on by the court of appeals in criticizing the Commission, the court said:

"[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results" *Portland Cement Ass'n v. Ruckelshaus*, 158 U.S. App. D.C. 308, 327, 486 F.2d 375, 394 (1973), *cert. denied*, 417 U.S. 921 (1974).

munications Act,¹⁸ the format change requirement adopted by the court of appeals originated with the court of appeals and is not a requirement of the Communications Act. The format change requirement represents nothing more and nothing less than a policy judgment by the court of appeals that such regulation would be desirable in the public interest. Indeed, the only provision of the statute relied on by the court of appeals was the broad and amorphous public interest requirement,¹⁹ a provision whose interpretation is primarily within the province of the expert agency and not a court of appeals.²⁰

¹⁸ Section 315(a), Communications Act of 1934, as amended, 47 U.S.C. § 315(a).

¹⁹ Sections 309(a), 310(d), Communications Act of 1934, as amended, 47 U.S.C. §§ 309(a), 310(d). The court of appeals stated:

"The basic premise of our format cases is that the Communications Act's 'public interest, convenience and necessity' standard includes a concern for diverse entertainment programming" (footnotes omitted). FCC App. A at 4a-5a.

In *WEFM*, the court had also relied in part on Section 303(g) of the Communications Act. See *Citizens Comm. to Save WEFM v. FCC*, 165 U.S. App. D.C. 206, 506 F.2d 246, 267 (1974) quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943). Section 303(g) provides, *inter alia*, that the Commission shall "[a] study new uses for radio . . . and generally encourage the larger and more effective use of radio in the public interest." This Court limited the reach of Section 303(g) in *FCC v. National Citizens Comm. for Broadcasting*. By relying solely on the "public interest" standard as the basis of its format decisions, the court of appeals has apparently abandoned its view that the "larger and more effective use" standard of Section 303(g) specifically compels the Commission to regulate radio broadcast formats.

²⁰ See *Bowman Transp. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 293 (1974). In addition to construing the Communications Act's "public interest" standard as not compelling format regulation, the Commission also relied on § 3(h) of the Act, 47 U.S.C. § 153(h), which provides that a broadcaster is not to "be deemed a common carrier," as being inconsistent with format regulation. 60 F.C.C.2d at 859, citing *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

The court not only failed to find any specific statutory support for its holding, it relied on no legislative history interpreting the general public interest standard to require regulation of entertainment and information formats. In fact, the legislative history runs contrary to the court of appeals' interpretation of the "public interest" standard. During the consideration of the Radio Act of 1927 by Congress, it was repeatedly suggested that the power to regulate musical formats should be granted to the proposed Federal Radio Commission since the Department of Commerce declined to regulate the type of music being broadcast by licensees, and its practice was to accord no greater preference for the "broadcast of sacred music" than for the "broadcast [of] jazz."²¹ Reference was made to the existing inability of "high-class music" applicants to obtain licenses, and it was questioned whether, "on the ground that it is a matter of public interest," there "ought not to be some provision [in the new bill] to afford a better and more wholesome set of programs than sometimes exist."²² In the House, the granting of such authority was found objectionable because it would "be almost the entering wedge to censorship," and a provision which would have granted such regulatory authority to the agency was deleted from the bill.²³ The Senate not only accepted this deletion, but

²¹ *Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37 (1926) (hereinafter *Hearings on H.R. 5589*).

²² *Hearings on H.R. 5589* at 38.

²³ Congressman Wallace White, the author of the bill that became the basis of the Radio Act of 1927, originally sought to give the proposed Federal Radio Commission authority to prescribe "the priorities as to subject matter to be observed." H.R. 7357, 68th Cong., 1st Sess. § 1(B) (1924). Congressman White omitted this provision from the bill he introduced in the 69th Congress, H.R. 5589, 69th Cong., 1st Sess. (1926). He confirmed that no such programming priorities were authorized by the bill and that the

went further and adopted a provision barring censorship specifically.²⁴ This provision, now Section 326 of the Communications Act, 47 U.S.C. § 326, was incorporated in the final bill because of the extensive fears of agency censorship expressed in both Houses.²⁵ Thus, the legislative history of the Communications Act shows that Congress considered and specifically rejected proposals to give the Commission authority to regulate the types of music being broadcast.²⁶

In keeping with that Congressional judgment, from the very beginning of its regulation of radio the Commission has carefully avoided any prescription of types of program format.²⁷ Thus, it refused to consider whether an applicant "placed undue emphasis on 'hillbilly' music"²⁸ or whether an applicant had improperly failed to continue as a "good music" station.²⁹ In 1956 the Commission noted that "the Commission has never imposed a definite program format as a prerequisite to an authorization for

deletion of the language granting authority had been made intentionally, "because of the fear which had been expressed by so many to me that that did confer something akin to censorship." *Hearings on H.R. 5589* at 39-40.

²⁴ *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926).

²⁵ H.R. Conf. Rep. No. 1886, 69th Cong., 2d Sess. 19 (1927).

²⁶ Congress has subsequently rejected proposals to amend the Communications Act to confer the authority to establish program priorities; in doing so members of Congress again made clear that they believed the Commission should not regulate licensee programming by directing that "symphonic music" be presented in preference to, say, "bogie-woogie" music. 106 Cong. Rec. 17,638 (1960) (comments of Sen. Pastore).

²⁷ See 3 Ann. Rep. FRC 17 (1929).

²⁸ *Richmond Newspapers, Inc.*, 11 P&F Radio Reg. 1234, 1270 n.13 (1955).

²⁹ *The Good Music Station, Inc.*, 23 F.C.C. 611, 620 (1957). See generally *Programming Policy Statement*, 44 F.C.C. 2303 (1960).

operation of a television or radio broadcast station.”³⁰ In its 1960 *Programming Policy Statement*, the Commission rejected arguments for “requir[ing] licensees to present specific types of programs,”³¹ and stated that each “licensee must find his own path [of programming] with the guidance of those whom his signal is to serve.”³² Similarly, the Commission observed in its 1971 *Ascertainment Primer*:

“Our view has been that the station’s [entertainment] program format is a matter best left to the discretion of the licensee or applicant”³³

Even after the recent court of appeals decisions, the Commission “repeatedly urged [the court of appeals] to reverse or drastically curtail the decisions.”³⁴

Before these recent court decisions, no court had ever required or suggested that the Commission was compelled to regulate changes in station program formats. The decisions of this Court repeatedly made plain that, apart from general responsibilities such as the fairness doctrine, licensees were primarily charged with determining the needs and interests of their audiences and making programming judgments as trustees for the public.

In ruling otherwise the court below has disregarded the teachings of a number of decisions of this Court. As this Court found in *CBS v. DNC*, “Congress intended to permit private broadcasting to develop with the widest

³⁰ *E. Okla. Television Co.*, 14 P&F Radio Reg. 148, 149 (1956) (dictum). See also *Brush-Moore Newspapers, Inc.*, 11 P&F Radio Reg. 641, 697 (1956).

³¹ *Programming Policy Statement*, 44 F.C.C. at 2308.

³² *Id.* at 2316.

³³ *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C. 2d 650, 679 (1971).

³⁴ FCC App. A at 22a (footnote omitted).

journalistic freedom consistent with its public obligations.”³⁵ Last term, in *Midwest Video Corp.*, this Court reaffirmed “the policy of the Act to preserve editorial control of programming in the licensee”³⁶ Earlier, in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940) this Court stated:

“the field of broadcasting is one of free competition Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.”

The court of appeals nevertheless rejected the Commission’s policy statement confirming the licensee’s role, and found that format regulation was required in order to insure diversity in broadcast service.³⁷ The approach of the court of appeals is identical to the approach taken by the same court in *NCCB v. FCC*, which was re-

³⁵ 412 U.S. at 110.

³⁶ 99 S. Ct. at 1444 (1979).

³⁷ At various places in its opinion, the court of appeals made its own intuitive factual findings at variance with the conclusions of the Commission. For example, although the Commission found that even formats that are generally characterized as the same are not necessarily substitutes for one another, 60 F.C.C.2d at 872-83, the court of appeals substituted its own “common sense” finding that “lovers of disco will switch to another disco station in preference to classical, all-news, country and western or the like.” FCC App. A at—. In the words of the dissent:

“[The majority] mounts untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission’s.” FCC App. A at 55a (Tamm, J., dissenting).

versed by this Court.³⁸ There, the court of appeals held that the Commission had acted improperly in "grandfathering" certain newspaper-broadcast station combinations because the Commission's statutory obligation to promote diversity in broadcasting precluded the continued existence of such combinations. This Court concluded that the court of appeals had overstepped its authority because the determination of what action should be taken to encourage diversity in broadcasting was for the Commission, not the court of appeals, to decide.

In their minority opinions in this case, three judges of the court of appeals correctly concluded that the majority's rejection of the Commission's radio format policy—in Judge Tamm's words—"disregards the Commission's expert knowledge and, in so doing, violates the [Supreme Court's] mandate of *FCC v. National Citizens Committee for Broadcasting*."³⁹

II. THIS COURT SHOULD ALSO GRANT REVIEW BECAUSE THE COURT OF APPEALS HAS DECIDED AN IMPORTANT CONSTITUTIONAL ISSUE, AND ITS DECISION IS AT VARIANCE WITH THE FINDINGS OF THE AGENCY AND WITH A DECISION OF THIS COURT.

The court below failed to offer more than passing reference to the constitutional issues presented by its decision, much less articulate any basis for concluding that the regulation it required was consistent with the First Amendment.⁴⁰ Judge Bazelon, in his concurring

³⁸ *FCC v. NCCB*, 436 U.S. 775 (1978).

³⁹ FCC App. A at 56a (Tamm, J., dissenting); see FCC App. A at 41a n.4 (Bazelon, J., concurring).

⁴⁰ The court's discussion of the constitutional issue consists entirely of its statement that in *WEFM* "although we did not explicitly address the constitutional implication of our decision, the constitutional issue was commented upon" by Judge Bazelon (FCC App. A at 33a); its statement that the Commission should adopt

opinion below, pointed out that while the majority "acknowledges the 'sensitive First Amendment implications' of government oversight of format choice," it "fails to grapple seriously with the constitutional implications of its decision."⁴¹

The Commission in its opinion concluded that program format regulation "would be . . . unconstitutional as impermissibly chilling innovation and experimentation in radio programming."⁴² Similarly, on reconsideration the Commission explained: "[W]e were firmly convinced, that the regulatory policy outlined in *WEFM* represented a serious departure from the policies which we believe are required by . . . the First Amendment."⁴³ Three judges of the court of appeals agreed that court-ordered format regulation created substantial First Amendment concerns.⁴⁴ These concerns arise because, in the present situation, unlike in applications of the Commission's fair-

procedures to minimize First Amendment problems (FCC App. A at 31a); and its determination that the Commission "has provided little or no evidence that *WEFM* has in fact deterred licensees' format choices." (FCC App. A at 25a).

⁴¹ FCC App. A at 42a (Bazelon, J., concurring) (footnote omitted). The court's failure to consider the constitutional issues may be attributable to the fact that the decision under review merely reiterated its earlier decision in *WEFM*. What the court failed to note was that at the time of *WEFM*, the constitutional issues had been neither briefed nor argued.

⁴² 60 F.C.C. 2d at 865-66. The Commission was convinced that regulation of program formats would produce "an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion," and would raise serious constitutional questions "because 'a comprehensive, discriminating, and continuing state surveillance would inevitably be required to ensure that these restrictions are obeyed.'" 60 F.C.C.2d at 865, quoting *Lemon v. Kurtzman*, 401 U.S. 602, 619-20 (1971).

⁴³ 66 F.C.C. 2d at 79.

⁴⁴ FCC App. A at 48a n.8 (Tamm, J., dissenting); FCC App. A at 42a (Bazelon, J., concurring).

ness doctrine, the licensee is not afforded the latitude to make its own program judgments and to select its own programming.

In rejecting the findings of the Commission, the decision of the court below is completely at odds with this Court's decision in *CBS v. DNC*. In that case, this Court made clear that careful consideration must be given to the determinations of the Commission in this special constitutional area,⁴⁵ stating that, in evaluating First Amendment claims, "we must afford great weight to the decisions of Congress and the experience of the Commission."⁴⁶ The form of regulation at issue in this case is surely as intrusive as that presented in *CBS v. DNC*, and would draw the Commission just as deeply into supervision of programming.⁴⁷ Because the dangers of regulation are equally stark here, there is equal reason for this Court to defer to the Commission's findings.

The Commission's findings strongly support its view that the regulation mandated by the court of appeals would not be consistent with the First Amendment.

⁴⁵ The Court said:

"Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century. For, during that time, Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned." 412 U.S. at 102.

⁴⁶ *Id.* See also *Pacifica*, 438 U.S. at 761-62 (Powell, J., concurring).

⁴⁷ For example, Commissioner Robinson saw serious constitutional problems arising from the *WEFM* policy because the Commission "will have 'to oversee far more of the day-to-day operation of broadcasters' conduct' than even would have been the case with mandatory access editorial advertising, a reason of apparently constitutional stature in the Supreme Court holding in [*CBS v. DNC*]." 57 F.C.C.2d at 600.

First, the Commission correctly found that format regulation would require routine intervention into licensee programming decisions. As Judge Bazelon observed, "regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over others."⁴⁸ Although the court of appeals attempts to minimize the extent of this intrusion into licensee discretion by noting that the Commission need intervene only when "there is strong prima facie evidence that the market has in fact broken down,"⁴⁹ this standard would be satisfied whenever there is an indication that a format is "unique" and there is significant "public grumbling" about the proposed change,⁵⁰ even if, as may often be the case, the "grumblers" are not representative of a large segment of the audience. Moreover, the Commission's supervision will not be limited to situations where a format change is proposed by an assignee, but will extend to situations where some community group believes that the licensee has wrongfully changed its format without Commission approval.⁵¹

Second, the Commission correctly found that format regulation would necessarily require application of subjective and elusive standards that would exert an unduly chilling effect. For example, determining the "uniqueness" of a format entails deciding whether the community's need for "beautiful" music is satisfied by "popu-

⁴⁸ FCC App. A at 42a. (Bazelon, J., concurring) (footnote omitted).

⁴⁹ FCC App. A at 24a.

⁵⁰ *Citizens Comm. to Keep Progressive Rock v. FCC*, 156 U.S. App. D.C. 16, 24, 478 F.2d 926, 934 (1973).

⁵¹ *Notice of Inquiry*, 57 F.C.C. 2d at 596. (Concurring Statement of Commissioner Robinson). See also *Georgetown University*, 66 F.C.C. 2d 944 (1977). As noted above, note 13, *supra*, the logic of the decision suggests that applicants proposing unique formats might have to be preferred over existing licensees broadcasting conventional formats where there was a significant demand for such a format.

lar standard" fare,⁵² or whether its demand for "laid back" music is met by providing "bubblegum rock."⁵³ By engaging in format regulation the Commission would be required to make a variety of unguided judgments in the area of taste. Indeed, the Commission found that it had no rational basis for determining which entertainment program formats would better serve the public interest.⁵⁴ As this Court ruled in *FCC v. NCCB*, "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds."⁵⁵

Third, the Commission correctly found that the vagueness of any regulatory policy involving monitoring of program formats, together with the exhaustive nature of the hearing process, would operate to chill the incentive of licensees to experiment with new forms of programming. Indeed, the Commission found that licensees would hesitate to modify their formats in any way for fear of incurring the consequences of a challenge.⁵⁶ The court of appeals fails to come to grips with this finding, but

⁵² See *SRD Broadcasting, Inc.*, 57 F.C.C. 2d 354 (1975).

⁵³ Renewed Motion for Stay and Motion for Stay of Citizens Comm. to Save Jazz Radio at 3-4, *Riverside Broadcasting Co.*, No. BTC 7817 (FCC, filed Sept. 14, 1976). These are not atypical problems. In *WEFM*, the court required a hearing on whether or not a "fine arts" station adequately served the "classical" music lovers of Chicago. The court also suggested that a classical station playing Bach, Mozart, Brahms, and Beethoven might well have a different format from one offering Stravinsky, Copland, Bartok, and Bernstein. 165 U.S. App. D.C. at 203-04, 506 F.2d at 264-65.

⁵⁴ 60 F.C.C.2d at 864.

⁵⁵ 436 U.S. at 796-97, quoting 555 F.2d at 961.

⁵⁶ "Under the threat of a hearing that could cost tens or hundreds of thousands of dollars, many licensees might consider the risk of undertaking innovative or novel programming altogether unacceptable." 60 F.C.C.2d at 865.

suggests only that the Commission "provided little or no evidence that *WEFM* has in fact deterred licensees' format choices" ⁵⁷ Of course, as this Court has often recognized, it is extremely difficult to marshal concrete evidence that regulation contrary to the First Amendment has chilled freedom of expression.⁵⁸ The Commission's expert finding in this area is entitled to great weight.

The court below appeared to conclude that "the Commission's fears appear somewhat less than realistic" because a mere handful of format cases has reached the court of appeals and that, in each of the three where the court held that a hearing was required, the controversy was ultimately settled by the parties.⁵⁹ The very fact that broadcasters feel compelled to settle cases in order to avoid the burden of the hearing suggests that the Commission's conclusion as to the chilling effect of such regulation is well founded.

Fourth, the Commission correctly found that format regulation would accord inadequate protection to the First Amendment rights of major segments of the listening audience. For example, the court of appeals would apparently accord little significance to the listening preferences of those who would prefer the programming proposed by the licensee. The Commission appropriately found that such an approach would impermissibly favor the interests of those preferring an existing station

⁵⁷ FCC App. A at 25a.

⁵⁸ As this court said in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963): "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." See generally *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); *NAACP v. Button*, 371 U.S. 415, 433 (1963). Moreover, when the Commission compiled its record in the proceeding below, the *WEFM* decision was relatively recent. Its ultimate deterrent effect on format changes may not yet have been felt.

⁵⁹ FCC App. A at 19a.

service.⁶⁰ As the record shows⁶¹ and as the Commission found,⁶² many listeners identify with a station's programming for reasons other than its format, such as the personality of the broadcast personnel or the particular selections of music within the format. Moreover, format regulation accords influence over a licensee's format to those segments of the community most vocal in asserting their listening preferences.⁶³ The size of this complaining group—i.e., the "significant public grumb[lers]"⁶⁴—simply may not accurately reflect true demand for the abandoned format, much less suggest a breakdown in the market.⁶⁵

As with many constitutional issues, balancing the factors involved in format regulation requires predictive judgments, based on assumptions concerning future actions of those affected. Where, as here, the expert agency selected by Congress has concluded that its *own* regulation would conflict with the First Amendment, the court of appeals should not lightly reject that finding.⁶⁶ Review is warranted because the court of appeals has intruded into a sensitive First Amendment area and has not accorded the Commission's judgments the weight due those of the expert agency, as required by decisions of this Court.

⁶⁰ 66 F.C.C. 2d at 85.

⁶¹ J.A. 444-45.

⁶² 60 F.C.C. 2d at 863.

⁶³ See 66 F.C.C. 2d at 85.

⁶⁴ *Progressive Rock*, 156 U.S. App. D.C. at 24, 478 F.2d at 934.

⁶⁵ B. Owen, *Radio Station Format Changes, Diversity, and Consumer Welfare* at 7 (J.A. 443).

⁶⁶ *FCC v. NCCB*, 436 U.S. at 813-14.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

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APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

" 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(g), provides:

"Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

Section 308 of the Communications Act of 1934, as amended, 47 U.S.C. § 308, provides:

“(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of

the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title.”

Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), provides:

“(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.”

Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d) provides:

"(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 315(a), provides:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Section 402(b) of the Communications Act of 1934, as amended, 47 U.S. § 402(b), provides:

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. _____

NATIONAL ASSOCIATION OF BROADCASTERS,
NATIONAL BROADCASTING COMPANY, INC.,
WBNS TV INC. AND RADIO OHIO INCORPORATED,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Petitioners National Association of Broadcasters, National Broadcasting Company, Inc., WBNS TV Inc., and Radio Ohio Incorporated * respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 29, 1979.

OPINIONS BELOW

The opinion of the court of appeals (FCC App. 1a)¹ has not yet been reported. Its judgment appears as FCC App. 57a. The opinion of the Federal Com-

* All petitioners were intervenors in the court of appeals. In addition to WNCN Listeners Guild, Respondents include Citizens Communications Center, Classical Radio for Connecticut, Inc., Committee for Community Access, and United Church of Christ.

¹ The Federal Communications Commission and the United States of America have petitioned for a writ of certiorari to review the

munications Commission (FCC App. 117a) is reported at 60 F.C.C.2d 858 (1976). Its decision denying reconsideration (FCC App. 176a) is reported at 66 F.C.C.2d 78 (1977).

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. On September 21, 1979, the time for filing this petition was extended to November 26, 1979 in an Order signed by Mr. Chief Justice Burger. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals improperly abridged the discretion of the Federal Communications Commission concerning the achievement of diversity in radio programming, by insisting that the FCC regulate certain proposed changes in the artistic and journalistic formats of radio broadcast stations.

(a) Whether the Communications Act of 1934 requires the FCC to regulate such program format changes.

(b) Whether the FCC's decision to leave the selection of program formats to marketplace forces was reasonable and within its discretion.

2. Whether the First Amendment to the Constitution and Section 326 of the Communications Act prohibit government dictation of artistic and journalistic radio formats as mandated by the court of appeals.

decision involved in this petition. The opinions of the Commission and the court of appeals are included in the Appendix to the government's petition and will be cited herein as "FCC App."

STATUTES INVOLVED

Sections 303, 308, 310, and 326 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 303, 308, 310, and 326. These statutes appear as an appendix to this petition.

STATEMENT OF THE CASE

This case involves a reviewing court's mandate—over the administrative agency's strong objection—requiring government prescription and prohibition of radio programming.

Following public notice and written comments by interested parties, the Federal Communications Commission adopted a statement of policy explaining its judgment that it should not regulate program format changes by radio broadcast stations.² In its statement, the FCC reconsidered and rejected a policy which it had once accepted at the appellate court's instigation³ after almost 40 years without such regulation.

² Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, 57 F.C.C.2d 580 (1976) ("Notice of Inquiry"); FCC App. 60a, 60 F.C.C.2d 858 ("Policy Statement") FCC App. 117a, *recon denied*, 66 F.C.C.2d 78 (1977), FCC App. 176a.

A radio station's program format is the comprehensive pattern of material it broadcasts. It usually emphasizes one or more types of music, and the music is intermixed with varying amounts and styles of verbal continuity and non-entertainment programming, e.g., news and public affairs. Some stations broadcast all-news, religious, foreign language, ethnic, or "talk" programs, instead of music, as their format choice. Thus, contrary to the title of the FCC proceedings, this case involves more than entertainment programming.

³ See *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc.*

The court's policy required an evidentiary hearing on any format change proposed by . . . applicant for assignment or transfer of control of a radio broadcast license, if such change would mean the loss of a "unique" format in that radio market, if a substantial amount of public protest occurred, and if the station could not establish that it was losing money as a direct result of the present format.

The FCC's Notice of Inquiry commencing this proceeding was prompted by the appellate court's reversal in the *WEFM* case⁴ of an adjudicatory decision in which the FCC had granted a license assignment application without an evidentiary hearing. In that earlier case the court of appeals had not only disagreed with the Commission's application of the "unique"-format policy to the facts of that case,⁵ but also had criticized the Commission majority's stated willingness to leave broadcasters' format choices to competition in the radio marketplace except in extreme situations. Without any record or briefing on the underlying statutory question, the court of appeals had declared that the Communications Act's "public interest" standard and its mandate to the FCC to "generally encourage the larger and more effective use of radio in the public interest"⁶ compelled the Commission to forcefully ap-

v. FCC, 478 F.2d 919 (D.C. Cir. 1973); *Hartford Communications Committee v. FCC*, 467 F.2d 408 (D.C. Cir. 1972); *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970).

⁴ *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*).

⁵ *Id.* at 264-65.

⁶ *Id.* at 267, citing 47 U.S.C. § 303(g).

ply the "unique"-format policy developed by the court in order "to secure the maximum benefits of radio to all the people of the United States."⁷ The court had opined that there is "no longer any room for doubt that, if the FCC is to pursue the public interest, it may not at the same time be able to pursue a policy of free competition" in program format selection by radio licensees.⁸ The Commission's subsequent Notice of Inquiry questioned these conclusions and asked for comment on a number of factual and legal issues suggested by the court's dicta.

The FCC decided that it should adopt a different policy, after considering 50 sets of written comments and reply comments including substantial exhibits of economic studies and other data from parties with conflicting viewpoints and from its own staff.⁹ The Commission concluded that the regulation of programming required by the court in *WEFM* was inconsistent with the policy Congress had adopted for broadcasting in the Communications Act, presented insoluble problems in application and, in the absence of more extensive government control over program content, was unlikely to provide any significant increase in the substantial diversity provided by the marketplace. 60 F.C.C.2d at 865, FCC App. 129a-30a.

The Commission's conclusions in the *Policy Statement* were based partly on its understanding of the continuing force of the interpretation of the Communi-

⁷ *Id.* (emphasis deleted), quoting *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943).

⁸ *Id.*

⁹ See *Policy Statement*, Appendices A & B, 60 F.C.C.2d 858, 866, FCC App. 117a, 135a.

cations Act by the Supreme Court in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), that "the Act recognizes that the field of broadcasting is one of free competition." 60 F.C.C.2d at 860, FCC App. 122a. The implication of this view of the Act for regulation of program formats was clear to the Commission: "broadcasters are to compete with one another, and they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take." 60 F.C.C.2d at 860, FCC App. 123a.

The Commission found that market forces had provided a significant, even if not perfect, amount of diversity. 60 F.C.C.2d at 863, FCC App. 128a-29a. Moreover, only market forces could reflect the element of intensity of demand for different formats, allowing for diversity *within* format types as well as *among* them. *Id.* The Commission observed that "allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate." 60 F.C.C.2d at 864, FCC App. 131a.

The Commission also found that format regulation would present a vexing and basically insoluble problem of identifying and defining individual formats. The Commission pointed to the acute difficulties presented where "progressive rock" formats must be distinguished from other types of "rock", and where emphasis on 19th century classical music might have to be distinguished from a format including more 20th century classical music. The Commission found that this "elusiveness" in format definition had serious practical consequences in making it "impossible for a broadcaster to know prospectively what sort of entertainment

programming the public interest standard requires it to present" and plaguing as well, the Commission's "review of the licensee's discretion." 60 F.C.C.2d at 862, FCC App. 127a.

The Commission also concluded that regulation of entertainment formats had constitutional dimensions in at least two important respects. First, the threat of a hearing that might accompany an effort by a licensee to modify a format would, in the Commission's view, make the risk "of undertaking innovative or novel programming altogether unacceptable." 60 F.C.C.2d at 865, FCC App. 132a-33a. The Commission found that this common carrier-like "obligation to continue service . . . deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no offsetting justifications . . ." *Id.* Secondly, implementation of format regulation would necessarily result in the Commission's "entanglement in matters that Congress meant to leave to private discretion," and would raise serious constitutional questions "because 'a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed.'" 60 F.C.C.2d at 865, FCC App. 134a, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

Finally, based on its "further study" of the Commission's appropriate role in format regulation, its experience in attempting to comply with the mandates of the court of appeals in *WEFM* and earlier adjudicatory proceedings, and on the comments submitted in this proceeding, the Commission concluded "that the market is the allocation mechanism of preference for entertainment formats, and that Commission super-

vision in this area will not be conducive to producing either program diversity or satisfied radio listeners." 60 F.C.C.2d at 866 n.8, FCC App. 134a.

In denying subsequent petitions for reconsideration of the *Policy Statement*, the Commission adhered to its reasons for not interfering in radio program format selections and distinguished other forms of program regulation by the FCC. *Entertainment Formats* (Reconsideration), 66 F.C.C.2d 78 (1977), FCC App. 176a.

Several parties to the FCC proceeding invoked the jurisdiction of the court of appeals pursuant to 28 U.S.C. § 2342. The court of appeals, in the *en banc* decision of which review is here sought, held that the FCC *Policy Statement* is "unavailing and of no force and effect." Slip op. at 42, FCC App. 40a. Two judges (Tamm and MacKinnon, JJ.) dissented and a third judge (Bazelon, J.), while concurring in vacating the FCC decision on a procedural ground upon which the majority did not rest, indicated that on the merits he would uphold the Commission's policy judgment.

Judge McGowan, writing for the majority, reaffirmed *WEFM* and extended to license-renewal applications also (slip op. at 22, FCC App. 20a) the court's interpretation of the Communications Act that required an FCC evidentiary hearing on certain format change proposals made by license transfer applicants. The court of appeals was critical of the FCC for having challenged the court's statutory interpretation, and denied that the court was making policy for the Commission. While conceding that the FCC could rightfully attempt to demonstrate that incorrect factual premises underlay the court's findings about the marketplace

and that "an agency is better equipped to develop legislative-type facts than is this court" (slip op. at 36, FCC App. 34a), the court nevertheless disagreed with the economic and other factual premises of the Commission and engaged in its own analysis to determine whether competition among radio stations would provide program diversity as well or better than government regulation.

The court also found no merit in the Commission's concern about the administrative burden of the court's directive and otherwise defended its substantive and procedural directions as workable for broadcasters and the regulatory agency, even though (or particularly because) broadcasters often felt compelled to settle with protesting citizen groups rather than be delayed and burdened with a long hearing. Generally, the court accused the Commission of exaggerating the intrusiveness of the court's position, while at the same time criticizing the Commission for failing to take affirmative steps to minimize the intrusive features of *WEFM* and other format decisions (slip op. at 29, FCC App. 27a).

As its initial point and elsewhere in its opinion, the court of appeals faulted the Commission for not providing opportunity to the public to comment in advance upon a staff-prepared table, compiled largely from published trade materials, which set out the numbers of radio stations in 18 categories of formats in the largest metropolitan markets of the United States (Appendix B to the *Policy Statement*, 60 F.C.C.2d at 872-81, FCC App. 156a-70a). The court specifically declined to reject the *Policy Statement* on this ground (slip op. at 19 n.24, FCC App. 17a) and stated

that it could not be persuaded to accept the Commission's policy "even if we were to accept the study on its own terms" (slip op. at 37, FCC App. 35a).

In a concurring opinion, Judge Bazelon explained his vote entirely on the non-dispositive procedural point just mentioned. Beyond that, "because the majority has precluded the Commission from adopting a rule contrary to *WEFM*," he felt compelled to note his agreement with much of the dissenting opinion regarding the Commission's policymaking discretion under the public interest standard, especially considering the Supreme Court's reversal of the court of appeals' decision in *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *rev'd*, 436 U.S. 775 (1978). Judge Bazelon said that "the majority virtually confines the FCC to a spectator's role . . .," (opinion of Bazelon, J. at 1-2, FCC App. 41a-42a) and "fails to grapple seriously with the constitutional implications of its decision." (Opinion of Bazelon, J. at 2, FCC App. 42a.)

Judge Tamm, joined by Judge MacKinnon, wrote a dissenting opinion, charging that the majority's decision "usurps the proper role of the Federal Communications Commission . . . in the formulation of communications policy." (Opinion of Tamm, J. at 1, FCC App. 46a.) These judges, who found the majority's economic analysis flawed, thought the Commission's determinations were reasoned and not arbitrary or capricious and therefore should be affirmed without the necessity of reaching the "substantial" First Amendment concerns stated by the Commission (opinion of Tamm, J. at 3 n.8, FCC App. 48a). The dissenters faulted the majority for not deferring to the Commission's assessment of market conditions and concluded

that the court's decision "violates the mandate of *FCC v. National Citizens Committee for Broadcasting*." (Opinion of Tamm, J. at 11, FCC App. 56a.)

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with this Court's interpretation of the Communications Act of 1934 in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), and *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and presents important federal questions which should be decided by this Court. The court of appeals usurped the policymaking role of the Federal Communications Commission and violated the constitutional and statutory scheme prohibiting censorship and encouraging free competition in radio programming.

The Commission has never asserted, and no other court has ever suggested, the existence of such sweeping power to control the subject matter of radio programs. The First Amendment to the Constitution and Section 326 of the Communications Act¹⁰ prohibit such censorship; there is nothing in the Act that commands it, and the Commission acted well within its discretion in deciding that the public interest is better served by the licensees' selection of program formats under the discipline of strong competition in the radio marketplace.

I.

The court of appeals dictated a policy for the FCC to follow in acting upon renewal applications and transfer applications filed by radio broadcast stations. The court

¹⁰ Communications Act of 1934, as amended, Section 326, 47 U.S.C. § 326. The provisions of the Act cited herein are set forth in the Appendix to this petition.

did this entirely on the basis of its own findings concerning the operation of the radio market. The policy is important because it applies in every case in which an applicant proposes to change a "unique" program format (or, if the Commission prefers, in every case in which there is "significant" listener protest to the change of any format). The court, however, denied that it was making policy and claimed instead that it was reaffirming the "law" it had expounded in *Citizens Committee to Save WEFM v. FCC*,¹¹ a limited-party adjudicatory case that prompted the Commission to initiate this public inquiry proceeding.

As explained hereinafter, the court of appeals was clearly wrong in its understanding of what the Communications Act required in this respect; the Act does not require this kind of overall program regulation. To the contrary, legislative history and the decisions of this Court support if not require the Commission's policy judgment *not* to regulate to this extent. It therefore follows that the Commission's determination, factually supported and otherwise reasonable, should have prevailed.

By standing on *WEFM*, the court of appeals interpreted the "public interest" standard of Section 310 (d) and the "larger and more effective use" language of Section 303(g) of the Communications Act (47 U.S.C. §§ 303(g), 310(d)) to require artificial governmental fostering of diversity in radio program choices, despite the absence of such regulation until the court originated it almost four decades after Congress adopted the Act. Unlike the situation in *WEFM* and

¹¹ 506 F.2d 246, 258-62, 266-68 (D.C. Cir. 1974) (*en banc*).

earlier adjudicatory cases,¹² the court of appeals has now persisted in its views despite a full agency record of factual data and argument, including contradiction of the *WEFM* court's economic premises, and despite the agency's reasoned conclusion that the public interest in diverse programming is better served by reliance on marketplace forces in the highly competitive radio industry.

In *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [hereinafter *NCCB*], this Court disagreed with the same court of appeals, which had relied upon essentially the same statutory language.¹³ This Court then decided that the Act—specifically, Section 303(g) and, implicitly, the "public interest" standard—did not compel the Commission to require divestiture of "grandfathered" newspaper-broadcast station combinations for the sake of structural diversity.¹⁴ The court of appeals was faulted for substituting its policy judgment for that of the Commission.

The court of appeals has made the same mistake in the instant case in demanding government manipulation of program diversity, even though both courts had recognized in *NCCB* that "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds."¹⁵ This Court held, contrary to the court of appeals, that diversity was not the preeminent

¹² See note 3 *supra*.

¹³ See 436 U.S. at 790-91.

¹⁴ *Id.* at 782, 809-11.

¹⁵ *Id.* at 796-97, quoting 555 F.2d at 961.

policy under the Communications Act, and that, to achieve the best practicable service to the public, the Commission could give greater weight to policies other than diversification.¹⁶

The Court in *NCCB* upheld the FCC's weighing of competing public interest factors, and reaffirmed that the expert agency, not the court, was the proper forum for establishing policy. In their minority opinions in this case, three judges of the court of appeals correctly concluded that the majority's rejection of the Commission's radio format policy—in Judge Tamm's words—"violates the [Supreme Court's] mandate of *FCC v. National Citizens Committee for Broadcasting*." ¹⁷

The decision of the court of appeals also conflicts with *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940), which interpreted the Communications Act to mean that

¹⁶ *Id.* at 804-06.

¹⁷ Dissenting opinion of Tamm, J. at 11, FCC App. 56a; opinion of Bazelon, J., concurring in vacating decision on other grounds, at 1 and n.4, FCC App. 41a.

Judges Tamm and MacKinnon stated:

"More important than the specifics of the current debate, is the lack of deference the majority accords the Commission's assessment of market conditions. Although the majority acknowledges the expertise of the Commission to challenge the factual premises that underly the *WEFM* decision, it mounts untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's." (Opinion of Tamm, J. at 10, FCC App. 55a.)

"the field of broadcasting is one of free competition . . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

The court of appeals noted the Commission's reliance upon *Sanders Brothers* (slip op. at 13 n.16, FCC App. 11a), but failed to deal with its rationale that free competition in radio necessarily means free competition in the offering of programs, as this Court recognized in the above-quoted language.¹⁸ The court's reading of Section 303(g) to require government intervention into programming decisions to obtain an artificial diversity thus conflicts with the free market intent of Congress recognized in *Sanders Brothers* and other cases, and with other provisions of the Communications Act.¹⁹

¹⁸ In *WEFM*, 506 F.2d at 267, the court of appeals seemed to suggest that *Sanders Brothers* had been undermined by the "more recently" decided case of *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), which included this Court's statement that the FCC had a mandate "to secure the maximum benefits of radio to all the people of the United States." *Id.* at 217. We do not understand how that language or anything else in *NBC* could be construed to modify this Court's statement in *Sanders Brothers* about free competition in programming. *NBC* upheld FCC rules designed to promote rather than restrict the free choice of programs by radio stations. More recently still, this Court has recognized "the policy of the Act to preserve editorial control of programming in the licensee . . ." *FCC v. Midwest Video Corp.*, 99 S. Ct. 1435, 1444 (1979); *accord*, *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 110, 124-25 (1973).

¹⁹ The statutory directive of Section 303(g) to "generally encourage the larger and more effective use of radio in the public interest" does not attempt to describe specifically what that "use"

The refusal of the court of appeals to credit the Commission's theory of marketplace competition under the Communications Act magnifies the already large importance of this case because the agency has more recently proposed rulemaking to deregulate radio programming in other respects that arguably would be in-

should be, how it should be attained, or even how it relates to the "public interest." The legislative history of that provision does not expand upon the words themselves. However, the history of another portion of Section 303 is pertinent. Under subsection (b) the Commission was given the power to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class" (47 U.S.C. § 303(b)), but it was made clear that this power did *not* encompass the power "to establish the priorities as to subject matter" to be observed by each class of licensed stations and each station within any class. See Hearings on H.R. 5589 Before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess. 39 (1926) (Statement by Congressman White, co-author of the Radio Act of 1927, from which the Communications Act is derived.) Such authority was withheld on the ground that its exercise would be "akin to censorship." *Id.* Another provision, now Section 326 of the Communications Act, 47 U.S.C. § 326, specifically bars censorship.

Also to the contrary of the directive of the court of appeals in this case, Section 310(d) of the Act, 47 U.S.C. § 310(d), prohibits program comparisons between a buyer and a seller, as well as between a buyer and other possible buyers. The statutory language and the legislative history of the 1952 amendments to the Communications Act demonstrate that Congress prohibited all types of comparisons in license transfer and assignment proceedings because the buyer is to be treated as an applicant for a new station under Section 308 of the Act, 47 U.S.C. § 308. See Brief for NAB in the court below at 8-16, discussing, *inter alia*, 98 Cong. Rec. 7394, 7397, 9022, 9033 (1952); Hearings on S. 1973 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. 35 (1949); Hearings on S. 658 before the House Committee on Interstate and Foreign Commerce, 82d Cong., 1st Sess. 73, 96-97 (1951); S. Rep. No. 44, 82d Cong., 2d Sess. 12 (1952). The court of appeals mischaracterized this argument and refused to consider it even though it had been presented extensively to both the court and the Commission. Slip op. at 28-29 n.37, FCC App. 26a-27a.

consistent with the rationale of the court of appeals. *Deregulation of Radio*, 44 Fed. Reg. 57636 (1979). Moreover, since the licensing decisions affected by the court's policy can only be appealed to the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), no other court of appeals will be able to consider the issues in this case, and thus there is no possibility of a conflict in the circuits that could generate further review by this Court. The rulemaking nature of this case, as well as its broad present and future implications for the formulation of communications policy, dictates that review by this Court occur now.

As with most rulemaking decisions, balancing the factors involved in format regulation requires predictive judgments, based on assumptions concerning future actions of those affected. Such predictive judgments have been considered the province of the expert agency. *NCCB*, 436 U.S. at 813-14; *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961). Predicting and obtaining program diversity require sensitive judgments about the effects of future developments on licensee behavior and listener habits. The Commission here predicted that diversity could best be obtained by not regulating changes in formats. Absent compelling evidence to the contrary, its judgment should have been respected by the court of appeals.

The Commission relied in part on radio market studies submitted by its staff and by broadcasters responding to the Notice of Inquiry.²⁰ These studies

²⁰ The court refused to give weight to an FCC staff study of radio diversity because of the Commission's failure to release it for comment prior to decision. In fact, the FCC study merely confirmed,

showed that broad diversity in formats already exists in the major markets, and that the court's belief that radio advertisers direct their purchases of commercial air-time exclusively towards majoritarian and youth-oriented programming is erroneous. In addition, the studies showed that the *intensity* of demand for formats varies widely, so that greater public satisfaction may be arrived at through the broadcast of two similar program formats rather than two distinctly different formats.²¹

The court of appeals rejected these conclusions and reiterated the "findings" that supported its *WEFM* decision. Although survey data demonstrated that public desire for alternatives within formats was often stronger than desire for "unique" formats, the court found that "common sense" dictated the opposite result. Slip op. at 39, FCC App. 37a.²² Thus, while at-

on the basis of data largely obtained from trade publications, the conclusions reached from similar studies publicly filed by several broadcaster parties. No party, either before or after the Commission's decision, has challenged the accuracy of this data, and the court of appeals did not rest its decision on the FCC's failure to seek public comment thereon. Slip op. at 19 n.24, FCC App. 17a.

²¹ A study by economist Bruce Owen (presently Director, Economic Policy Office, Antitrust Division, Department of Justice) demonstrated that differing levels of intensity of demand for formats made the use of a simplistic "uniqueness" standard ineffective in maximizing consumer satisfaction. Professor Owen concluded that operation of the existing market satisfied demand as well or better than any system of regulation. This NAB-commissioned study, which was available to all parties, was relied on by the Commission. 60 F.C.C.2d at 863-64, FCC App. 129a-30a, and by the dissenters in the court of appeals. Opinion of Tamm, J. at 7-8 n.14, FCC App. 52a-53a. It was ignored by the majority.

²² In an attempt to show that the market did not function as the Commission had concluded, the court twice stated that opinion surveys indicated that 16% of the listeners in Atlanta had pre-

tempting to cast doubt upon the FCC's findings, the court refused even to consider serious objections raised to the presumptions it had employed in the earlier format cases.

In rejecting the Commission's data and policy analysis, the court of appeals has independently determined what FCC policy should be, regardless of whether the agency concurs or whether experience supports the court's perceptions. As this Court has repeatedly held, however, it is a fundamental principle of administrative law that the responsibility for determining regulatory policy lies with the agency, not with a reviewing court, particularly in defining a term as broad as the "public interest." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). Although phrased in terms of a decision on the "law", the court's policy requires an intrusion into licensee decisionmaking far beyond anything previously forced upon the Commission. The

ferred classical music, even though the licensee had attempted to abandon the format. Slip op. at 8 n.7, 38 n.52, FCC App. 6a, 26a. To the contrary, as was pointed out to the court, the Atlanta study showed only that 16% of the sampled listeners preferred classical music to the particular alternative format proposed by the station buyer in Atlanta. The court wholly ignored the likelihood that classical music was the second, third or lower-level overall preference of many of those who favored it in the context of a limited choice. The hearing record in *WEFM* further shows the unreliability of the court's assumptions. In *WEFM*, the court relied on a survey which found that 18% of the public desired classical music. 506 F.2d at 264 n.25. Yet out of a metropolitan area population of 5,000,000, ratings data introduced at the hearing showed that the three stations which featured classical music had a total audience of fewer than 20,000 persons. The court did not address this disparity. Were 16% or 18% of the listeners in a large metropolitan area actually listening to a station, that station would not only lack incentive to change its format, it likely would be the most listened-to station in the market.

court has usurped the agency's role, as it did only to be reversed by this Court in *NCCB and Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) [hereinafter *CBS*].

II.

The decision of the court of appeals violates the First Amendment to the Constitution, as well as the no-censorship prohibition of Section 326 of the Communications Act, 47 U.S.C. § 326. The court's interpretation means that a station's basic format—be it classical music, contemporary music, news or some other specialty programming—will be determined by the Commission after an evidentiary hearing if listener protest and the other circumstances posited by the court are present. If the Commission rules against presentation of the proposed format, the resulting prior restraint of protected speech would be both direct and complete. Such a far-reaching power of program censorship—without any objective standard for choice between two formats—cannot be reconciled with the First Amendment and Section 326.²³

The program format having the most obvious journalistic value is the all-news format. The possibility of government prohibition of a radio station's change to

²³ See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553-54 (1975).

The court of appeals has attempted to establish the "narrowness" of its decision by making the astonishing statement that the Commission "has no authority under *WEFM* to interfere with licensee program choices: it cannot restrain the broadcasting of any program, . . . [or] force retention of an existing format. . . ." Slip op. at 27-28, FCC App. 25a-26a. This disclaimer is in direct conflict with the court's instructions to the FCC throughout the opinion.

an all-news format presents a striking First Amendment question. But there are also important free-speech values in non-news program elements, for example, "talk" (including studio and telephone interviews), music lyrics, program continuity and commercial advertising.²⁴ It is notable that the broadcaster's journalistic discretion and "editing" function given protection in the *CBS* case did not directly involve news and public affairs departments, but rather, sales and managerial departments which refused to sell commercial advertising time for the presentation of public-issue announcements. The interrelationships and unity of broadcast operations as essentially journalistic in character were implicitly recognized in Chief Justice Burger's opinion.

The *CBS* opinion also explained how our commercial broadcast system is based upon a "historic aversion to censorship."²⁵ The Court emphasized that traditional First Amendment freedoms were written into the Communications Act.²⁶

Regardless of whether a format change is ultimately permitted after an evidentiary hearing, the Commission's subjective value judgments, made under the

²⁴ "What is one man's amusement, teaches another's doctrine." *Winters v. New York*, 333 U.S. 507, 510 (1948). In recent years, the Court has given additional protection to product advertising. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and cases cited therein.

²⁵ 412 U.S. at 116.

²⁶ "Many of those policies [of the 'public interest' standard of the Act], as the legislative history makes clear, were drawn from the First Amendment itself; the 'public interest' standard necessarily invites reference to First Amendment principles." 412 U.S. at 122.

court's policy requiring a choice between program formats, would violate the First Amendment and Section 326.²⁷ There is no way that the Commission can avoid making subjective judgments about whether one or another format better serves the public interest. Considering the inherent lack of standards for choosing between program formats once the public interest in both is shown,²⁸ the potential for agency decision-making on the basis of the personal tastes and cultural biases of individual commissioners is great.

The mere threat of later government compulsion to retain a format, thus "locking in" the broadcaster, is seriously inhibitive to any broadcaster considering the adoption of a format that is unique or that might subsequently become unique in the marketplace. Innovative programming is thus deterred. Similarly inhibiting and productive of self-censorship is the possibility of a protracted and costly evidentiary hearing before a decision on whether to permit any change from a "unique" format. Self-censorship takes the form of either (1) a foregone opportunity to change a program format because of the threat or fear of litigation, or (2) a program settlement under duress from a special-interest listeners group that has petitioned to deny a license renewal or transfer application involving a format change.²⁹

²⁷ *Cf.* National Ass'n of Independent Television Producers and Distributors v. FCC, 516 F.2d 526, 539-41 (2d Cir. 1975).

²⁸ *See* FCC v. Pacifica Foundation, 438 U.S. 726, 761 (1978) (Powell, J., concurring).

²⁹ The court of appeals cited such settlements approvingly because they resolve the issue without a hearing that is administratively

This government-induced self-censorship by broadcasters curbs the exercise of First Amendment rights to the detriment of the public as well as broadcasters.³⁰ In its decision, the Commission found that the prospects of inhibiting experimentation were real and "of great importance."³¹ In these circumstances, the inhibiting regulation of program formats would be constitutionally defensible only upon the showing of a subordinating interest which is compelling.³²

Far from establishing a compelling reason for such regulation, the Commission found that the need for greater diversity in radio program formats in each market is dubious at best. "To sacrifice First Amendment protections for so speculative a gain is not warranted . . ."³³ Thus, in addition to the unconstitutionality of the direct prior restraint discussed above, broadcasters' self-censorship necessarily resulting from the FCC's role in format choice would clearly violate the First Amendment.

Three judges of the court of appeals, like the Commission, thought that court-ordered format regulation created substantial First Amendment concerns.³⁴ The

burdensome to the FCC. Slip op. at 20-22, FCC App. 18a-20a. However, the essential point is that in a settlement—usually an agreement to continue the old program format in some form—the licensee is not making a free choice under marketplace competition that serves all listeners in the community.

³⁰ *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

³¹ 60 F.C.C.2d at 865, FCC App. 132a-33a.

³² *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); NAACP v. Button, 371 U.S. 415, 439 (1963).

³³ *CBS*, 412 U.S. at 127; *see also* Buckley v. Valeo, 424 U.S. 1, 44-45 (1976).

³⁴ Opinion of Tamm, J., at 3 n.8, FCC App. 48a; Opinion of Bazelon, J., at 2-3, FCC App. 42a-43a.

majority of the court likened format regulation to the judicially approved fairness doctrine,³⁵ conceding in order to make their point, that both forms of program regulation "involve the Commission in an area charged with sensitive First Amendment implications."³⁶ However, there are obvious and significant distinctions between the broad discretion given to broadcasters under the statutory fairness doctrine³⁷ (and other forms of limited and non-prohibitory FCC program regulation), on the one hand, and this court-initiated format prohibition and prescription, on the other.

No court has ever required or permitted the FCC to determine the general substance of a broadcaster's overall programming (other than the court of appeals in its program format cases). Indeed, no court has successfully required the FCC to intrude into *any* form of program regulation which the agency opposed.³⁸ That is the proper judicial deference to the Commission's interpretation of its authorizing statute, informed by a purpose to avoid abridgement of the First Amendment rights of broadcasters.

³⁵ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

³⁶ Slip op. at 33, FCC App. 31a.

³⁷ "[I]t contemplates a wide range of licensee discretion." FCC v. *Midwest Video Corp.*, 99 S. Ct. 1435, 1444 n.14 (1979).

³⁸ Cf. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). Compare *Public Interest Research Group v. FCC*, 522 F.2d 1060, 1067 (1st Cir. 1975) ("... we have doubts as to the wisdom of mandating, rather than merely allowing, governmental intervention in the programming and advertising decisions of private broadcasters").

CONCLUSION

The court of appeals has disregarded the limits of judicial review by its unprecedented compulsion of FCC control over artistic and news programming. The regulation in question, which involves program censorship by the FCC and government-induced self-censorship by broadcasters, violates the First Amendment to the Constitution and Section 326 of the Communications Act. Therefore, review by this Court is required, and this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 26, 1979

STATUTORY APPENDIX

Section 303 of the Communications Act, 47 U.S.C. § 303:**Powers and duties of Commission**

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

• • •

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

• • •

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

• • • •

Section 308 of the Communications Act, 47 U.S.C. § 308:**Requirements for license****(a) *Writing; exceptions***

The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it:

• • •

(b) *Conditions*

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location

of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

. . . .

Section 310 of the Communications Act, 47 U.S.C. § 310:

. . .

(d) *Assignment and transfer of construction permit or station license*

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 328 of the Communications Act, 47 U.S.C. § 328:

Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

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IN THE
Supreme Court of the United States
October Term, 1979

Nos.: 79-824, 79-825, 79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
INSILCO BROADCASTING CORPORATION, et al.,
AMERICAN BROADCASTING COMPANIES, INC. et al.,
NATIONAL ASSOCIATION OF BROADCASTERS, et al.,
Petitioners,

-v.-

WNCN LISTENERS GUILD, et al.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**JOINT BRIEF IN OPPOSITION FOR RESPONDENTS
WNCN LISTENERS GUILD, INC., CITIZENS
COMMUNICATIONS CENTER, CLASSICAL RADIO
FOR CONNECTICUT, INC. AND COMMITTEE
FOR COMMUNITY ACCESS**

Respondents WNCN Listeners Guild, Inc. and Citizens Communications Center, and Respondents Classical Radio for Connecticut, Inc. and Committee for Community Access respectfully request that this Court deny the petitions for writs of certiorari seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. On December 12, 1979, the Clerk of this Court granted an extension of time within which to file a response or responses to the petitions for writs of certiorari to and including February 6, 1980.

Opinions Below

The full texts of the opinion of the Court of Appeals (not yet officially reported), and the Notice of Inquiry (reported at 57 F.C.C.2d 580) and Orders (reported at 60 F.C.C.2d 858 and 66 F.C.C.2d 78) of the Federal Communications Commission are printed in the appendices to the Petition for Writ of Certiorari filed by Petitioners Federal Communications Commission and United States of America in No. 79-824. For convenience, references to those opinions and orders will be cited to the FCC's appendices ("FCC App.").

Statutes Involved

Sections 309(a), (d) and (e) and 310(d) of the Communications Act of 1934 (the "Act") are reprinted as Appendix B to this Brief.

Question Presented

For the reasons set forth below, respondents believe that a grant of certiorari is not warranted in the present case.

In the event, however, that this Court should decide to grant certiorari, respondents respectfully request that, in lieu of the questions propounded by petitioners, all of which implicitly or explicitly misstate the holding of the Court of Appeals, such grant be limited to the following question:

Whether the Court of Appeals correctly held that the Federal Communications Commission, in determining whether the assignment or renewal of a broadcasting license would serve the "public interest, convenience and necessity" as required by the Communications Act of 1934, must consider the public interest effect upon diversity of the loss by a community of its only source of a financially viable type of specialized programming, and that a public hearing is required by the Communi-

cations Act where there is any substantial and material question of fact relating to such loss or its impact upon the public interest.

Counterstatement

Introduction

Whether or not to grant certiorari in any cases including this one, must ultimately turn on the question of what is to be reviewed. Only after the issue is framed, may this Court determine its importance in terms of impact, resolution of unsettled questions or conflicts in the Circuits, and the like.

All the petitioners in the instant case have recognized this obvious fact. All have endeavored, with greater or lesser degrees of poetic or other license, to present as the "issues" to be reviewed, questions of apparently enormous importance regarding the relationship of courts to administrative agencies¹ and dangerously threatened First Amendment values.²

¹ The questions presented by the various petitioners on this issue may be summarized and paraphrased as

"Did the Court of Appeals improperly substitute its own factual premises and policy views for the Commission's expert determination that the regulation of radio formats is unnecessary and in fact detrimental to the public interest, and did it abridge the Commission's discretion in determining how to achieve diversity of radio programming." See, e.g., Petition of Insilco Broadcasting Corp. at 3 ("Insilco Pet."); Petition of National Association of Broadcasters at 2 ("NAB Pet.").

In fact, however it may be phrased, the question they really ask is whether this is *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) ("NCCB") revisited. As we shall demonstrate, it most clearly and unequivocally is not. See, e.g., Note 66, p. 27 *infra*.

² The questions presented here include whether the Court of Appeals has unconstitutionally required "government dictation of artistic and journalistic radio formats" and "government prescription and prohibition of radio programming." NAB Pet. at 2-3. Again, these questions bear no relation to the case actually before this Court.

In fact, the issue presented by the Court of Appeals decision is far more modest, and entirely unexceptional in its articulated adherence to 40 years of this Court's interpretation of the Communications Act of 1934.³ Far from imposing new rules or policies on the Commission, the Court of Appeals decision was no more than a continued direction to the Commission to fulfill its statutorily mandated obligation to make a public interest determination weighing the effect of abandonment of a unique format in certain extremely limited circumstances. The Court's direction demanded no particular result. It required only that in appropriate individual cases the Commission must "take a look" and make its own determination.⁴

There has never been any real question that the public interest standard includes diversity of programming. The Commission has accepted and acted upon this notion in a variety of other contexts, and accepts it here. The problem with the Commission's *Policy Statement*⁵ was its inexplicable, flat and unequivocal refusal to "look" at the public interest in diversity when an application proposing abandonment of a unique, financially viable format⁶ was before it.

The Commission's reason, from the first decided case through the Inquiry reviewed below, has been its belief that marketplace forces do the job of promoting diversity as well, if not better than the Commission itself can.

³ 47 U.S.C. §§ 151 *et seq.* (1976) (the "Act").

⁴ This is, of course, the major and controlling difference between the instant case and *NCCB*.

⁵ *Memorandum Opinion and Order* in Docket No. 20682, 60 F.C.C.2d 858 (1976), FCC App. 117a (the "*Policy Statement*").

⁶ While the decided cases have involved primarily "musical" entertainment formats, the same principles hold for informational, educational and, of course, foreign language formats.

Although the Commission recognizes that the marketplace occasionally fails,⁷ it has insisted on absolute deference to free competition, and has flatly and unequivocally refused to engage in any regulatory behavior - again, in short, it has refused even to take the "look" necessary to determine whether the public interest will be served by granting a particular assignment or renewal application.

The decision of the Court of Appeals simply restates, with abundant citation to decisions of this Court and the Communications Act itself, that in enacting the Communications Act, Congress specifically eschewed the notion that unbridled competition was consistent with the public interest. Instead, it undertook a regulatory licensing scheme which would provide a means for assuring that, in each instance, the public interest was preferred over that of private parties, however competitive. Accordingly, the Court of Appeals has simply reinstructed the Commission that it may not, consistent with the statute and this Court's exegesis, abdicate all responsibility in assessing entertainment formats to the marketplace, and, in addition, that an outright refusal to make a public interest determination in a particular case is an impermissible abdication of its obligation under the statute.

In order to understand what both the Commission and the Court of Appeals actually did, as opposed to what petitioners have freely characterized them as having done, it is useful to review in some detail not only the two decisions below, but the history of format cases which led to this "unseemly and unnecessary confrontation" between the Commission and the Court of Appeals and which, as Commissioner Fogarty wrote,⁸ makes this case so inappropriate for Supreme Court review.

⁷ *E.g.*, *Policy Statement*, FCC App. at 128a. It is, of course, only when such marketplace failure happens that the unique format issue arises.

⁸ Fogarty, C., dissenting from the Commission decision to seek certiorari in this case. A copy of Commissioner Fogarty's dissent is attached as Appendix A to this Brief, and will hereafter be cited by the prefix "A" followed by the appropriate page number.

The Format Cases - Atlanta to WEFM

In August of 1969, the Commission granted, without a hearing, a contested⁹ application for assignment of an Atlanta radio station, WGKA, refusing to weigh the effect on the public interest of the assignee's proposed format change from classical music to "easy listening." A survey demonstrated that some 16% of Atlanta listeners preferred classical music, which was available only on WGKA, while the proposed format duplicated one which was already broadcast on a number of stations.

On October 30, 1970, the Court of Appeals reversed the Commission and remanded for an evidentiary hearing as to a number of issues. *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM and FM) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) (hereinafter "*Atlanta*"). The Court held that because the public interest standard of the Communications Act clearly includes diversity of programming, the listening preferences of a substantial minority audience must be weighed in determining an assignment application which would deprive that audience of a unique format.

In the four years after its decision in *Atlanta*, the Commission was confronted with four more assignment

⁹ The proposed assignment was contested in a petition for reconsideration filed by the first of a number of listeners' groups which were heard by the Commission and the courts since the decision in *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*United Church of Christ I*") which granted standing to citizens' groups functioning as "private attorneys general."

applications where citizens groups raised the issue of the loss of a unique format.¹⁰

In two of them, no material issues of fact were raised,¹¹ one went to the Court of Appeals on a stay application.¹² The fourth was *Progressive Rock*, where material issues were raised as to the uniqueness and financial viability of a format sought to be abandoned, but the Commission granted the assignment application without a hearing on those disputed facts and legal issues. The D.C. Circuit, on appeal, again explained to the Commission that format changes affecting diversity must be treated no differently than any other element affecting the public interest - i.e., if there are factual

¹⁰ These were *Citizens Committee to Preserve the Present Programming of WONO (FM) v. FCC*, 71-1336 (D.C. Cir. May 13, 1971) (summary reversal on application for stay) (hereinafter "*WONO*"); *Twin States Broadcasting, Inc.*, 35 F.C.C.2d 969 (1972), rev'd. sub nom. *Citizens Committee to Keep Progressive Rock (WGLN-FM) v. FCC*, 478 F.2d 926 (D.C. Cir. 1973) (hereinafter "*Progressive Rock*"); *Charles A. Haskell*, 36 F.C.C.2d 78 (1972), aff'd. sub nom. *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973) (hereinafter "*Lakewood*"); and *RKO General, Inc.*, 23 RAD. REG. (P & F) 930, aff'd. sub nom. *Hartford Communications Committee v. FCC*, 467 F.2d 408 (D.C. Cir. 1972) (hereinafter "*Hartford*").

¹¹ In *Lakewood*, the D.C. Circuit agreed that there was no dispute that the format to be abandoned was not unique; and so affirmed the Commission's grant of the proposed assignment. In *Hartford*, similarly, there was no substantial factual dispute about the uniqueness of a format (which was only diminished, not abandoned) or about financial qualifications, and the D.C. Circuit affirmed the Commission's order granting assignment without a hearing.

¹² *WONO*, supra.

disputes a hearing must be held; if there are no factual disputes, it need not.¹³

The WEFM Decision

In 1973, confronted with a petition to deny an assignment application which allegedly would have eliminated a unique classical music format in Chicago, the Commission again refused to hold a hearing.¹⁴ Denying a petition for reconsideration, a majority of Commissioners also issued a separate "policy statement" in which they stated their belief that the efficacy of market forces in the area of entertainment formats made it both unwise and essentially unnecessary for the Commission to consider a format issue where it was raised in a petition to deny. *Zenith Broadcasting Corp.*, 40 F.C.C.2d 223, 230 (1973).¹⁵

On appeal, the Commission's order was initially affirmed, on the ground that there were no contested issues of fact requiring a hearing.¹⁶ Judge Fahy dissenting. *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974). On rehearing *en banc* the D.C. Circuit reversed,¹⁷ confronting the Commission's *Burch State-*

¹³ The Court noted what was becoming a seemingly intransigent position by the Commission regarding the refusal to consider this diversity issue in licensing proceedings, and wrote

"It is our distinct impression...that the Commission desires as limiting an interpretation [of *Atlanta*] as possible. We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of [*Atlanta*] to cases involving Atlanta classical music stations." *Progressive Rock*, *supra*, 478 F.2d at 930.

¹⁴ *Zenith Broadcasting Corp.*, 38 F.C.C.2d 838 (1972).

¹⁵ This was the *Additional Views of Chairman Burch In Which Commissioners Robert E. Lee, H. Rex Lee, Reid, Wiley and Hooks join* (hereinafter the "*Burch Statement*").

¹⁶ Writing for the majority, Chief Judge Bazelon found that the entire listening area served by WEFM was served by another classical music station, accordingly, he held, there was no substantial issue of fact requiring a hearing on the diversity point.

¹⁷ *Id.* at 252 (*en banc*). The *en banc* decision will be cited hereinafter as "*WEFM*".

ment by reviewing its prior decisions from *Atlanta* to *Progressive Rock*, and placing them squarely in a statutory analysis of § 309(a), (d)(1) and (d)(2) of the Communications Act.¹⁸

Since both the Act and the Commission's prior policies clearly included diversity of programming within the public interest standard,¹⁹ the Court again admonished the Commission to fulfill its § 309 obligation to hold a hearing where there were material facts concerning the loss of diversity from the abandonment of a unique format.²⁰

¹⁸ Section 309(e) requires the Commission to hold a hearing where a "substantial and material question of fact" is presented to the Commission while the Commission is making a statutorily required public interest determination.

¹⁹ Section 303(g) of the Act makes clear that the public interest to be served is the interest of the listening public in "the larger and more effective use of radio." This view of the statute was reiterated by this Court in, *inter alia*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943), where Mr. Justice Frankfurter wrote that "the avowed aim" of the Act was "to secure the maximum benefits of radio to all the people of the United States." *Id.* In his concurring opinion in *WEFM*, Judge Bazelon pointed to a consistent line of Commission licensing decisions where the "uniqueness" or contribution to diversity of proposed programming had been considered by the Commission. *WEFM*, *supra*, 506 F.2d at 280, n. 63 (concurring opinion) and cases cited therein.

²⁰ "When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest." *WEFM*, *supra*, 506 F.2d at 262.

The Court made it clear how seldom this would actually occur by listing a number of factors to be considered. These included a requirement of substantial public grumbling about the proposed change,²¹ the financial viability of the format sought to be abandoned,²² and the absence of any substitutes for that format in the licensee's service area. Only where there were material facts in dispute²³ did the Commission need to hold a hearing, and then, of course, it was totally free to make whatever determination of the public interest it saw fit.

The Commission Inquiry on Changes in the Entertainment Formats of Broadcast Stations

The Commission chose not to seek this Court's review of the *WEFM* decision, but rather determined

²¹ If there were no such grumbling, the Commission would never even have occasion to consider the remaining questions, thus insuring that only questions which truly had a significant public interest impact on a substantial portion of the listening audience need be considered. In addition, since it is the "substantial public grumbling" which triggers the Commission's obligation to look, the hyperbole about wide ranging, day-to-day censorship which appears in some of the petitions for certiorari is unwarranted and untrue.

²² No one, and certainly not the Court of Appeals, has ever suggested that a licensee must retain a format which is not financially viable.

²³ Of course, under applicable law and Commission rules, such disputes can arise only on the basis of affidavits of persons having actual knowledge of the facts, see 47 U.S.C. § 309(d)(1) (1976), not on mere allegations. This too is clearly a limiting factor.

to institute an "Inquiry" into whether or not it should follow that decision.²⁴ FCC App. 66a *et seq.*

In engaging in this entirely unorthodox and essentially illegal enterprise,²⁵ the Commission demonstrated that its past resistance and enduring concern were based on a total misreading of what the Court of Appeals had done.²⁶ It paraphrased the *WEFM* decision²⁷ as presenting the question

"Whether the public interest standard of the Communications Act of 1934, as amended, requires close scrutiny of broadcast entertainment formats to assure an appropriate diversity?" *Notice of Inquiry*, Para. 8, FCC App. 65a. (emphasis added).

²⁴ Commissioner Hooks concurred in the *Notice of Inquiry* insofar as it heralded an attempt to devise regulations for effectuating the *WEFM* decision. Significantly, he wrote,

"I was one of those who joined former Chairman Dean Burch's statement in *WEFM* wherein we expressed a natural dread of becoming too deeply enmeshed in format choices. But, after reading again the decisions in the so-called 'format cases,' and, however loathe we personally may be to lay hands on the format porcupine, the final responsibility of assuring service to all segments of the community may ineluctably abide here." FCC App. at 78a-79a (footnotes omitted).

²⁵ As the Court of Appeals pointed out, within our system of constitutional government a reviewing court's interpretation of a statute is clearly binding on an administrative agency - only a higher court or Congress has the power to reverse or modify the reviewing court's decision. *WNCN*, FCC App. 32a-33a.

²⁶ The Court of Appeals wrote, "The Commission would likely have been less concerned had it read our format cases more accurately." *WNCN*, FCC App. 27a.

²⁷ The Commission also described the results of the Court's decision as

"rejecting the programming choices of individual broadcasters in favor of a system of pervasive government regulation." FCC App. 65a.

This, of course, was nothing like what the Court of Appeals had decided,²⁸ but the Commission proceeded to answer its own question in a proceeding which was as fraught with error as its phrasing of the question had been.

The Inquiry, from its inception to its conclusion, cannot be even charitably characterized as anything other than a sham. The *Notice* made abundantly clear that the Commission had entirely prejudged the issue,²⁹ and nothing which occurred subsequently cast any doubt upon that understanding.³⁰

The record of the Inquiry is filled with procedural irregularities, violations of the Administrative Procedure Act (the "A.P.A."), and a generally impermissible attitude of "hostility and impatience"³¹ toward public

²⁸ Clearly the Court's decision did not require "close scrutiny of broadcast entertainment formats" in general, since it was based entirely upon the requirement of a hearing only in very carefully delineated circumstances. Further, the Court of Appeals never even suggested that the Commission should generally assure diversity, but rather held only that in the same carefully delineated circumstances, it should look only at whether the loss of a particular format in a particular assignment situation would substantially decrease diversity.

²⁹ The Commission wrote that

"...the course charted by the Court may lead only to expense, delay and stagnation, with no assurance that a decision finally reached by the Commission would be in any sense superior to (or more in the public interest than) that favored by the marketplace." FCC App. 69a.

³⁰ The language and reasoning of the Commission's *Policy Statement* almost exactly mirror that of the *Notice of Inquiry*. Compare *Notice of Inquiry*, FCC App. 68a to *Policy Statement*, FCC App. 131a (public tastes subject to rapid change); *Notice of Inquiry*, FCC App. 68a to *Policy Statement*, FCC App. 128a (Commission's recognition that the marketplace is not perfect); *Notice of Inquiry*, FCC App. 68a to *Policy Statement*, FCC App. 130a (government supervision would be injurious to public interest).

³¹ Mr. Chief Justice, then Judge, Burger, rightly condemned such "hostility and impatience to Public Interveners" in *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548-550 (D.C. Cir. 1969) ("United Church of Christ II").

interest groups.³² Taken together, these errors of the Commission would have constituted independent grounds for reversal of its decision.³³ However, rather than individually enumerating and discussing each of those improprieties, respondents will discuss one clear violation of the A.P.A. and procedural due process - the Commission's reliance on "secret studies" - which both exemplifies³⁴ and poisons the record of the Commission's Inquiry.³⁵

³² For example, no motions for extensions of time clearly needed by understaffed and underfinanced citizens' groups were granted, while all requests for procedural relief made by broadcasters were. This was particularly acute in the matter of reply comments; since most out-of-town citizens' groups were unable to go to Washington to review the contents of comments which had been filed, they requested a brief extension until shortly after the scheduled publication of the issue of *Access* magazine which was to summarize these comments. The motion was denied, and, as a result, not one out-of-town group filed reply comments, though virtually all the broadcasters and industry groups did.

³³ The Court of Appeals did not find it necessary to so hold, since it found so many other flaws in the Commission's decision. Judge Bazelon, who did not share the majority's view as to some of those flaws would, however, have reversed and remanded solely on the basis of one of the procedural errors - the "secret studies" - alleged by the public interest groups on appeal.

³⁴ Respondents in no way concede that other errors, or the procedural record as a whole, did not also justify reversal below. These errors also make this an inappropriate record upon which to grant certiorari.

³⁵ See Dissenting Statement of Commissioner Fogarty, 1a-2a. Judge Bazelon, concurring below, found the "secret studies" issue sufficient, in and of itself, to require reversal and remand. FCC App. 41a.

Procedural Error - The "Secret Studies"

Early in the proceeding, Citizens Communications Center ("Citizens")³⁶ filed a pleading³⁷ calling upon the Commission to carry out or contract for a study which would provide empirical data on existing formats, changes which had occurred before and after *Atlanta* and *WEFM*, ownership and finances of radio stations in the major markets, and other information critical to the *Notice's* assumptions and the Commission's ultimate determination.³⁸ In denying that pleading, the Commission clearly stated its view that no such study was necessary.³⁹

Citizens then filed a Freedom of Information Act ("FOIA") request for data underlying the assumptions in

³⁶ Citizens is a public interest law firm specializing in communications law which has itself been a party or otherwise involved in several major cases before the D.C. Circuit and this Court. It was a party-petitioner in the Court of Appeals, and is one of the Respondents in the instant petitions.

³⁷ The Petition to Reconsider, Rescind, Suspend or Redirect Inquiry pointed out that the Inquiry was no more than an attempt to overturn the Court of Appeals decision by appealing it not to this Court or Congress, but to the broadcasters. In addition to the request for an empirical study, it asked, *inter alia*, for the Commission to "undertake affirmative measures to involve local participants" which, of course the Commission never did. (JA145 *et seq.*) (JA refers to the Joint Appendix filed in the Court of Appeals. A copy of this has been lodged with the Clerk of this Court for its convenience.)

³⁸ In the alternative, Citizens asked for sufficient time to allow listeners to conduct such studies themselves, to the extent that resources and information were available to them. It also requested reimbursement to such groups if the Commission declined to make or contract for the requisite studies.

³⁹ The Commission left open the possibility of calling for such a study after all the comments were in, if those comments did not provide satisfactory data upon which to make a decision (JA 169).

the Commission's *Notice of Inquiry*. The response was essentially that there was no such data (JA 52).⁴⁰

Following the filing of comments (which were, of course, heavily dominated by the industry), Citizens moved for a two-month extension for replies, again citing the need for an independent market study (JA 237). Again the motion was denied with no response to the request for a study (JA 248).

When, however, the Commission finally issued its *Policy Statement* refusing to follow *WEFM*, the Commission relied heavily⁴¹ on two "staff studies" which purported to demonstrate the adequacy of the marketplace in providing "a bewildering diversity of formats" and in providing maximum "consumer satisfaction."⁴² The conclusion of the studies was attached as an exhibit to the *Policy Statement*, FCC App. 156a, but the data from which they were derived was not.

The existence of these studies, much less the probability that the Commission would rely on them, had been entirely unknown prior to the issuance of the *Policy Statement*. This critical point was made by the WNCN Listeners Guild (the "Guild") in a petition for

⁴⁰ The *Notice* had included an Appendix purporting to show the diversity of formats existing in three major markets; the FOIA response explained that this "data" was obtained from *Broadcasting Yearbook*, an industry publication. Even this incredibly limited and inherently meaningless "data" was inaccurate since, as Citizens pointed out, the list failed to include an all-jazz format in New York after the Commission had been asked to review a transfer application seeking to abandon that very unique format!

⁴¹ The Commission's reliance on these studies is seen both in its own *Policy Statement*, FCC App. 129a, and in the Court of Appeals opinion, FCC App. 14a and 41a (concurring op. of Bazelon, J.).

⁴² The substitution of the term - and notion - of "consumer satisfaction" for the statutory standard of the public interest is unprecedented, unexplained, and incorrect.

reconsideration⁴³ which requested an opportunity to respond to the studies once the underlying data was made available.

Simultaneously, Citizens filed an FOIA request for that data so that the public might be able to analyze and criticize the studies and their conclusions (JA 68).⁴⁴ Citizens also wrote to the Commission requesting that the Inquiry be reopened until the FOIA request was resolved, and the public given an opportunity to comment (JA 70).

Although the Commission responded to the FOIA request by turning over numerous pages of virtually unintelligible computer print-outs,⁴⁵ it did so substantially after the time for filing petitions for reconsideration had

⁴³ The Commission allows petitions for reconsideration to be filed within 30 days of a decision. 47 CFR § 1.106(f) (1978). The standard of persuasion on such petitions is, by regulation, far greater than in the initial proceeding. 47 CFR § 1.106(c) (1978).

Nevertheless, a number of groups asked the Commission to reconsider its decision, some on the ground that although they were vitally interested in the issue, and had valuable and relevant information and insights to offer, they had not even known of the existence of the Inquiry until the decision was announced. See, e.g., JA 381. Their requests were, of course, ultimately denied. Other petitions for reconsideration alleged that their timely comments had never been considered and did not appear on the list of "Parties Filing Comments" attached to the *Policy Statement* (JA 392), or that the Commission had failed to send a copy of the *Notice of Inquiry* although specifically asked to do so (JA 350).

⁴⁴ The FOIA request also asked for

"...any materials which show the date on which the study was first requested within the Commission, the circumstances surrounding such institution of the study, and the dates covered by the study." (JA 68).

⁴⁵ In a subsequent letter to the Commission, Citizens pointed out that the material furnished was totally useless in and of itself (JA 100), a fact with which the Court of Appeals, viewing the print-outs (JA 76-87), quite reasonably agreed.

passed.⁴⁶ Citizens appealed the overly limited response to its FOIA request;⁴⁷ on November 24, 1976 the Commission denied the appeal.

In March of 1977, Citizens wrote to the Commission stating that it and other public interest groups were entirely unable to do any analysis of the studies because

"...the Commission failed to provide a directory to explain what the data in the computerized print-out means" (JA 100).

Sometime thereafter, with the actual date the subject of extreme and unresolved controversy,⁴⁸ the Commission placed a "Description of the Data Base" in its files. It is, however, undisputed that this was done long after the time for filing for reconsideration was past; this time was never extended, since the Commission refused to grant Citizens' previously described request to reopen or hold the Inquiry open until the studies had been commented upon.

⁴⁶ The exact timing is not clear, as is the case with so many critical facts in this record. The Commission's "answer" is dated Sept. 15, 1976 (2 weeks after the deadline for reconsideration) but the computer print-out material placed in its public file, reproduced in the Joint Appendix below, bears the date Dec. 6, 1976 on every page (JA 76-87).

⁴⁷ For example, the Commission declined to furnish any information about when the studies had been made, or who had made them (JA 73). See note 44 *supra*.

⁴⁸ The Commission claims to have done this on March 30, 1977, and produced a letter to that effect at oral argument. The letter was not, however, part of the Appendix, and no one from Citizens had ever seen it prior to argument. No public interest group, including any of the respondents here, had ever seen the "Description" until the Commission had placed it at the end of the second volume of the Joint Appendix. Significantly, the "Description" does not appear in the Certified List of Documents filed with the Court of Appeals in the late fall of 1977, after the Commission's final order denying reconsideration.

This somewhat tortuous history of the "secret studies" is included both to demonstrate the complete procedural unfairness⁴⁹ of the Inquiry, and the total lack of any acceptable evidence⁵⁰ upon which the Commission based its *Policy Statement*.

The Policy Statement

Given the *Notice of Inquiry*, the *Policy Statement* contained no surprises.⁵¹ It reiterated its faith in marketplace economics to maximize diversity (FCC App. 128a and 130a), although it admitted that there were clearly instances in which the market forces failed (FCC App. 128a). See also FCC App. 66a.

The Commission had clearly recognized that diversity in programming was correctly included in the public interest standard of the Act (e.g. FCC App. 71a), but it now flatly refused to consider that aspect of the public interest in assignment applications where the marketplace

⁴⁹ And, of course, violation of the A.P.A.'s "notice and comment" requirements, see discussion at pp. 31-35 *infra*.

⁵⁰ Since the evidence was never "tested" by criticism and comment, it was, under the A.P.A., court decisions and general principles of administrative law, an improper and inadequate ground upon which to base any decision. *Id.*

⁵¹ Commissioner Robinson filed a separate statement in which he expressed his view that, pursuant to the notion of judicial supremacy, the Commission was required to follow the Court of Appeals determination on review, whatever that decision might be.

Commissioner Hooks dissented, stating, *inter alia*,

"I do dissent because, without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces. The Commission's role in the commercial regulatory structure is well defined." FCC App. 171a (footnote omitted).

had demonstrably failed.⁵² In support of its absolute refusal to make the requisite public interest inquiry in those few cases, the Commission offered three reasons. They were:

- 1) To do so would impose "common carrier type" obligations on the licensees in violation of *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) ("CBS") (FCC App. 119a-123a),
- 2) To do so would involve the Commission in an "administrative nightmare" (FCC App. 131a-132a), and
- 3) To do so would have a chilling effect on broadcasters' programming choices in violation of the First Amendment⁵³ (FCC App. 132a-133a).

⁵² It wrote,

"The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 F.C.C.2d at 231. Having given the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor necessary in the public interest. Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats, and that Commission supervision in this area will not be conducive either to producing program diversity nor satisfied radio listeners." FCC App. 134a.

⁵³ The Commission inexplicably wrote, essentially without any analysis, and with no factual record to support, that following the *WEFM* decision would

"result[t] in an inhibition of constitutionally protected forms of communication with no off-setting justifications, either in terms of specific First Amendment or diversity-related values or in broader public interest terms." FCC App. 133a.

The Court of Appeals Decision

The justifications for abandonment of its clear statutory duty offered by the Commission were reviewed under ordinary principles of administrative law by the Court of Appeals, again sitting *en banc*. Applying those principles, it found the Commission's decision fatally lacking in both rationality and impartiality. The former characterization derived from its analysis of the Commission's stated reasons for abandoning the statutory scheme, an analysis premised upon an unbroken line of decisions by this Court,⁵⁴ the latter derived from numerous procedural violations,⁵⁵ including the previously discussed "secret studies" (FCC App. 14a-17a). The Court's discussions of the Commission's articulated reasons require only brief discussion here.

1) First, as to the Commission's claim that the record showed

"...how effective the tool of competition has been in carrying out Congress' plan for entertainment programming..."

the Court found that insofar as the record relied on primarily consisted of the unreleased, untested secret staff studies, that record was legally inadequate (FCC App. 15a).⁵⁶ Also, as a legal matter, the

"...finding that the degree of variation in audience share among stations programming the same format was as great as the variation among stations programming different formats..."

⁵⁴ See discussion at pp. 24-27, *infra*.

⁵⁵ The Court also noted, *inter alia*, the Commission's total failure to have considered many of the comments filed by public interest groups, particularly as those comments had, in good faith, responded to the Commission's rhetorical inquiries as to how it might possibly implement the format decisions - if, of course, it chose to do so. FCC App. 22a-23a. Such failure is also arguably a fatal violation of § 553 of the A.P.A.

⁵⁶ The serious procedural infirmity also diminished any assurance that the Commission's decision was "substantially accurate." *Id.*

is ultimately entirely irrelevant to the question of whether the Act requires the Commission to look at the loss of diversity in the threatened abandonment of a unique format (*i.e.*, when market forces *fail* to preserve or maximize diversity) in the context of a required public interest⁵⁷ finding.

2) The "administrative nightmare" stressed by the Commission in its *Policy Statement* and briefs to the Court of Appeals was conceded by counsel at oral argument to be an "exaggeration" and not "very significant at all" (FCC App. 20a); a voluntary but necessary characterization which the Court of Appeals determined was amply supported by an examination of the actual burdens imposed on the Commission by the format cases since *Atlanta*⁵⁸ (FCC App. 18a).

The Court also noted that the extent to which the Commission's *Policy Statement* laid so much stress⁵⁹ on an argument which was so lacking in actual merit was another factor "casting considerable suspicion on the rationality of that decision" (FCC App. 20a).

3) The Court of Appeals found that the common carrier argument was, based on this Court's decisions, legally incorrect. Both *CBS* and *FCC v. Midwest Video Corp.*, ____ U.S. ____, 99 S.Ct. 1435 (1979), discussed "common-carrier like obligations" as involving the require-

⁵⁷ Again we note that the Commission's apparent confusion of "consumer satisfaction" with the "public interest, convenience and necessity" may have played a large part in its misunderstanding of the statutory issue.

⁵⁸ In ten years, only a handful of cases reached the Court of Appeals; only one, *WEFM*, actually resulted in a hearing (and that case was settled before any appeals) and only a handful are presently pending. FCC App. 18a-20a.

⁵⁹ The Court aptly characterized the language of the briefs and decisions on this issue as "almost frenzied rhetorical excess." FCC App. 20a.

ment of some form of private access - not the requirement which has been upheld since the beginning of the Act that licensees are, as a condition of their licenses, required to provide programming which serves the public interest, see e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) ("*Red Lion*").

4) The Court of Appeals found that the Commission's First Amendment fears were also premised on a "drastic misreading of the format cases" (FCC App. 23a).⁶⁰ Rather than requiring pervasive, comprehensive governmental inquiry in *choosing* all formats, those decisions required no more review of programming in limited individual circumstances than has been repeatedly recognized as consistent with, and indeed required by the Communications Act.⁶¹

The Court of Appeals reviewed the record for evidence of the Commission's oft-stated contention that the format decisions would deter experimentation and innovation and found none - the Commission's own study, to the contrary,

"concluded that under the *WEFM* regime licensees have been aggressive in developing diverse entertainment formats" (FCC App. 25a).

⁶⁰ As the Court of Appeals wrote, the Commission "analyzed the problem in stark terms: formats are to be chosen either by market forces or by 'the alternative to the imperfect system of free competition...a system of broadcast programming by government decree.' Denial of Reconsideration, *supra*, 66 F.C.C. 2d at 81. *WEFM*, in the Commission's view, is the antithesis of the free market: it mandates a "system of pervasive governmental regulation." Notice of Inquiry, *supra*, 57 F.C.C. 2d at 582, requiring 'comprehensive, discriminating, and continuing state surveillance.' Policy Statement, *supra*, 60 F.C.C. 2d at 865, citing *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)." FCC App. 23a.

⁶¹ See discussion *infra* at pp. 24-31.

Finally, the Court emphasized the narrowness of the Commission's powers under *WEFM*, a limitation which falls well within the First Amendment broadcast decisions of this Court. It reiterated that the Commission "...merely has the power to take a station's format into consideration in deciding *whether to grant certain applications*. It has no authority under *WEFM* to interfere with licensee programming choices: it cannot restrain the broadcasting of any program, dictate adoption of a new format, force retention of an existing format, or command provision of access to non-licensees. To say that it is empowered to impose censorship or common carrier obligations is to stretch *WEFM* virtually beyond recognition." FCC App. 25a (footnotes omitted) (emphasis added).

Reasons Why the Writs Should be Denied

I

The Decision of the Court of Appeals Is Premised Upon and Compelled by the Communications Act and This Court's Consistent Interpretations of That Act

The decision below, like the prior format cases, is nothing more than a straightforward implementation of the regulatory scheme which Congress adopted in the Radio Act of 1927 and later the Communications Act of 1934, and which this Court has articulated in over forty years of decisions. The holdings of those decisions have clearly and consistently reiterated that Congress rejected reliance on competition alone as the basis for allocation and exploitation of the electromagnetic spectrum.⁶² Instead, as this Court has also repeatedly held, Congress enacted a comprehensive regulatory scheme based upon licensing the use of radio frequencies. The

⁶² As Justice Frankfurter wrote in one of his definitive explications of the Communications Act,

"Indeed, as to the industry before us in this case, there has been serious qualification of competition as the regulating mechanism. The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications. The Act by its terms prohibits competition by those whose entry does not satisfy the 'public interest' standard....

• • • •

"Of course, the fact that there is substantial regulation does not preclude the regulatory agency from drawing on competition for complementary or auxiliary support. Satisfactory accommodation of the peculiarities of individual industries to the demands of the public interest necessarily requires in each case a blend of private forces and public intervention.

• • • •

"...Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough." *FCC v. RCA Communications Inc.*, 346 U.S. 86, 93-94, 97 (1953) ("RCA")

licensing scheme imposed an obligation on the FCC to make choices among prospective licensees,⁶³ and to regulate those licensees consistent with the "public interest, convenience and necessity."⁶⁴

⁶³ For example, as Justice Frankfurter wrote in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) ("NBC")

"The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

"The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the 'public interest, convenience, or necessity'...." *Id.* at 215-216.

⁶⁴ As early as 1928 the Federal Radio Commission, the predecessor to the present Commission, wrote

"Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser." Federal Radio Commission, *Second Annual Report* 169-70 (1928), quoted with approval in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 139 n. 2 (1940)

A more recent, and oft-quoted reiteration of the paramount interest of listeners and viewers is found in *Red Lion*, 395 U.S. at 390. See note 74, p. 31, *infra*.

Under the Act, applications for all licenses, license renewals, and license assignments must be made to the Commission. 47 U.S.C. §§ 308 (a), 310(d) (1976). In determining whether to grant any such application, the Commission *must* make a finding that the public interest, convenience and necessity would be served thereby. 47 U.S.C. § 309(a) (1976). Where there are material questions of fact, a hearing must be held. 47 U.S.C. § 309(e) (1976).

In sum, the Act prohibits the Commission from relegating the public interest determination to the marketplace, and specifically imposes upon it the duty of making a public interest determination, including holding a hearing, where necessary, when it considers each individual license application.

In its *Policy Statement*, as in its prior format cases, the Commission has acted in direct violation of this clear statutory mandate. Its total reliance on marketplace forces flies in the face of the language in *RCA*, which limits the agency to "drawing on competition for complementary or auxiliary support. 346 U.S. at 94. Its absolute refusal to weigh the effect of the loss of a unique format on the diversity of programming available to the public,⁶⁵ even where it concedes that the marketplace has failed, violates section 309(a) of the Communications Act. Its refusal to hold a hearing where there are material questions of fact regarding the effect of that prospective loss of diversity on the "public interest, convenience and necessity" violates Section 309(e) of the Act.

The decision of the Court of Appeals below, and the format decisions *WNCN* reaffirmed, drew heavily on this Court's decisions in, e.g., *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), *NBC*, *RCA*, and

⁶⁵ Diversity of programming and the inclusion of unique formats within the concept of such diversity are conceded within the public interest standard. See p. 18, *supra*; FCC App. 71a.

Red Lion. The Court of Appeals did no more than reiterate the Commission's duty to make its own public interest determination⁶⁶ in narrowly defined circumstances, where the marketplace had failed to provide the diversity of programming inherent in the public interest standard.

Accordingly, as the Court of Appeals decision is clearly premised in the Communications Act, and in accord with all of this Court's relevant interpretations of that Act, there is no need to grant review in the instant case.

II

The Decision of the Court of Appeals Is Entirely Consistent with This Court's Explication of the First Amendment in the Broadcasting Context

The very same decisions of this Court which define the Commission's duty under the Act to select and regulate licensees in the public interest, establish clearly that the First Amendment does not prohibit the Commission from basing its public interest determinations in part upon the program proposals of applicants and the past programming of licensees. The holdings of these cases are summarized in *Red Lion*, which is completely dispositive here:

"Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them. 47 U.S.C. § 301. Unless renewed, they expire within three

⁶⁶ Thus this case is entirely distinguishable from *NCCB*, where the Commission refused to adopt a retroactive across-the-board rule requiring divestiture, but left open the possibility that in individual renewal applications of grandfathered combinations, the diversity issue would, if raised, be considered in making the requisite public interest finding. Unlike *NCCB*, the Court here has mandated no result; it has required only that the Commission employ its discretion in making the inquiry.

years. 47 U.S.C. § 307(d). The statute mandates the issuance of licenses if the 'public convenience, interest, or necessity will be served thereby.' 47 U.S.C. § 307(a). In applying this standard the Commission for 40 years has been choosing licensees based in part on their program proposals. In *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933), the Court noted that in 'view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses.' In determining how best to allocate frequencies, the Federal Radio Commission considered the needs of competing communities and the programs offered by competing stations to meet those needs; moreover, if needs or programs shifted, the Commission could alter its allocations to reflect those shifts. *Id.*, at 285. In the same vein, in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940), the Court noted that the statutory standard was a supple instrument to effect congressional desires 'to maintain...a grip on the dynamic aspects of radio transmission' and to allay fears that 'in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.' Three years later the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in general program format

and the kinds of programs broadcast by licensees. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)."

395 U.S. at 394-95. Thus, as *Red Lion* holds:

"No one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' *National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943).

"By the same token, as far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."

Id. at 389. The principles enunciated in *Red Lion* were most recently reaffirmed and applied in *NCCB*, where this Court held that it was not a violation of the First Amendment to deny licenses to, or even to require divestiture by, newspaper owners, where that has been found necessary to serve the public interest. 436 U.S. at 798-802.

This Court has also recently definitively concluded that the "anticensorship" provision of the Act, 47 U.S.C. § 326 (1976), does not "deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." *FCC v. Pacifica Foundation*, 438 U.S. 726, 735-37 (1978). This decision

completely rebuts petitioners' reliance⁶⁷ on Section 326. As the Court of Appeals stated, the suggestion that *WEFM* would empower the Commission to impose censorship "is to stretch *WEFM* virtually beyond recognition." *WNCN*, FCC App. 26a.

As the Court of Appeals pointed out,⁶⁸ the Commission's portrayal of *WEFM* as requiring "pervasive governmental regulation"⁶⁹ and "continuing state surveillance"⁷⁰ in fact bears little resemblance to what that and the other format cases held.⁷¹ Under the Court of Appeals decision, licensees are neither prohibited from broadcasting, nor required to broadcast, any particular programming or program format;⁷² nor are they required to provide access to non-licensees.⁷³

Rather than militating against the decision of the Court of Appeals, the First Amendment, as elucidated in this Court's broadcasting decisions, actually supports

⁶⁷ See FCC Pet. 18 n. 13; NAB Pet. 11, 20-24; Insilco Pet. 21; ABC Pet. 14-15.

⁶⁸ *WNCN*, FCC App. 23a-26a.

⁶⁹ *Notice of Inquiry*, FCC App. 65a.

⁷⁰ *Policy Statement*, FCC App. 134a.

⁷¹ The Commission's characterizations border on the ridiculous, since *WEFM* only held that in extremely limited circumstances, the Commission might be required to review a licensee's past programming in the context of a license renewal or assignment application. This is a far cry from the kind of day-to-day meddling in licensees' journalistic discretion which was envisioned as a possible result of the access scheme proposed in *CBS*.

⁷² *WNCN*, FCC App. 25a-26a. Since this is not a scheme for allocating formats to broadcasters nor of assessing the relative value of formats, petitioners' references to the legislative history of § 326 of the Act, NAB Pet. 15-16 n. 19; Insilco Pet. 20-21; ABC Pet. 14-15; are of no relevance to this case.

⁷³ *WNCN*, FCC App. 26a. Petitioners' attempts to analogize this case to such decisions as *CBS* and *FCC v. Midwest Video Corp.*, ____ U.S. ____, 99 S.Ct. 1435 (1979) are thus inappropriate.

and, indeed, compels it.⁷⁴ Accordingly, since the Court of Appeals decision falls squarely within this Court's prior holdings, the petitions for certiorari should be denied.

III

Because of the Violations of the Administrative Procedure Act and Fundamental Fairness, the Commission's Decision May Not Be Reinstated, and the Record Provides an Inadequate and Inappropriate Basis for This Court's Review

As this Court has recently held, the "adequacy" of a record to support an agency's findings

"...turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes." *Vermont Yankee Nuclear Power Corp. v. Natural Resources*

⁷⁴ As this Court held in *Red Lion*:

"[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. See *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362 (1955); 2 Z. Chafee, *Government and Mass Communications* 546 (1947). It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)....It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at 389-90.

Defense Council, 435 U.S. 519, 547 (1978) ("*Vermont Yankee*").⁷⁵

The applicable section of the Administrative Procedure Act, 5 U.S.C. § 553 (1976), requires a three-step procedure in agency rulemaking; notice to the public, an opportunity for interested parties to comment, and a decision based on "consideration of the relevant matter presented." Within this three-step procedure, the notion of fundamental fairness is entirely applicable, since

"...the reviewing court must satisfy itself that the requisite dialogue [between the agency and the public] occurred and that it was not a sham." Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 381 (1974) (hereinafter "Wright").⁷⁶

It is well settled that the "comment" requirement of Section 553 includes an opportunity to rebut, challenge or otherwise speak to all relevant material prior to the agency's decision.⁷⁷ See, e.g., Wright, *supra* at 379-81;

⁷⁵ This is consistent with the position taken by, e.g., the Fifth Circuit, which wrote that in reviewing agency determinations, the primary function of courts is not to insure correct decisions, but to preserve the integrity of the decision making process. *Bowman Transportation, Inc. v. United States*, 569 F.2d 912, 923-24 (5th Cir. 1978).

⁷⁶ The Wright article was cited with approval in *Vermont Yankee*, 435 U.S. at 547 n. 20.

⁷⁷ This interpretation of the "comment" requirement of the A.P.A. in no way conflicts with *Vermont Yankee*. A footnote in that opinion is a statement by the Nuclear Regulatory Commission describing the procedures used, the fact that no evidentiary material would have been received under different procedures, and the further fact that the petitioner had made not even a suggestion of what other substantive matters it might develop under another procedure. Not only were all documents made available well in advance of the hearing, the staff also made available its drafts and handwritten notes. Compare this with the deliberate withholding of information in the instant case. *Id.* at 540 n. 7.

Davis, *Administrative Law in the Seventies* (1976) § 601-1-1 (Supp 1977); *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 249-52 (2d Cir. 1977); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1259-61 (D.C. Cir. 1973).

Once data, or conclusions from data, or any study are "relied" upon by the agency, the participants must be furnished with that material as soon as it is practicably available, *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), *Cert. denied*, 417 U.S. 92 (1974), and must be given an opportunity to analyze and comment on the material as well as to challenge or otherwise comment upon the methodology employed in obtaining it. E.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973); *South Terminal Corp. v. EPA*, 504 F.2d 646, 664, 666 (1st Cir. 1974).

In the instant case, as the Court of Appeals more gently noted, the Commission flagrantly violated both the letter and the spirit of the A.P.A. - as well as the most basic notions of due process - by failing to reveal the information upon which it ultimately relied in making its determination.⁷⁸ This fundamental error was exacerbated

⁷⁸ There can be no substantial question as to the importance of the "secret studies" to the Commission's decision. As the Court of Appeals found:

"Even a brief perusal of the *Policy Statement* reveals that the staff study, which was issued as Appendix B thereto, had a major influence on the decision. The Commission cited it in the body of the *Policy Statement* as showing 'decisively... how effective the tool of competition has been in carrying out Congress' plan for entertainment programming'; as supporting the conclusion that 'the marketplace is the best way to allocate entertainment formats in radio'; and as strongly indicating that listeners carefully discriminate among stations programing the same format." FCC App. 14a (footnotes and citations in footnotes omitted).

both by the Commission's repeated reassurances to public interest groups *prior* to the decision that no studies were needed or contemplated,⁷⁹ and by its failure to provide necessary information to permit any meaningful comment on the studies *after* its decision.⁸⁰

The Court of Appeals did not find it necessary to rely on the "secret studies" issue in overturning the decision⁸¹ only because the Court saw it as symptomatic of even "broader defects" which were fatal to the Commission's action.⁸²

Respondents believe that under the A.P.A. and this Court's decision in *Vermont Yankee*, an agency decision may not be upheld where it has been made in a

⁷⁹ These "reassurances" were made in response to various pleadings filed by the public interest groups. See Counterstatement, *supra* at p. 14.

⁸⁰ No information about the studies was provided until after the period for filing reconsideration petitions had passed, although requests were promptly and properly made. The Commission refused to reopen the record to permit comment although specifically requested to do so (see pp. 15-17 *supra*), and ultimately denied reconsideration, continuing to rely on the untested studies (FCC App. 183a, 191a). Compare this situation with that in *Vermont Yankee* where this Court wrote

"...ACRS was not obfuscating its findings. The reports to which they referred were matters of public record, on file in the Commission's public document room...not one member of the supposedly uncomprehending public even asked that the report be remanded." 435 U.S. at 556-57.

⁸¹ Judge Bazelon, concurring, found this an independent ground for reversal. See FCC App. 41a.

⁸² As previously stated, respondents reserve the right to argue all the procedural irregularities and A.P.A. violations which not only made the decision below unfair, but which demonstrate that the decision itself was irrational and ultimately unsupportable.

procedure so flagrantly violative of the statute and fundamental fairness.⁸³

In addition, the "secret studies" and other violations of the A.P.A. permeate and poison this record in such a way that if review were granted, the "substantive" issues might well never be reached.

Even assuming *arguendo* that the Commission has presented this Court with issues which should be reviewed, it has not created an adequate or fair record upon which review can be based.⁸⁴ Accordingly, certiorari must be denied.

IV

The Present Case Is of Insufficient Importance to Warrant the Grant of Certiorari

As FCC Commissioner Fogarty stated in dissenting from the Commission's decision to petition this Court for certiorari:

"Any fair reading of the court's *WNCN* opinion indicates that format change hearings are likely to be few in number and that the Commission retains ample leeway and discretion to avoid any 'administrative nightmare' or collision with the First Amendment." 2a.

⁸³ As Commissioner Fogarty wrote in voting against the Commission's determination to seek certiorari here, the "secret studies" issue not only

"is a fatal flaw in any case for certiorari" but also

"goes to the integrity and fairness of the Commission's decision making process." (1a-2a).

⁸⁴ In this respect the instant case is also entirely distinguishable from prior cases where this Court has reviewed Policy Statements issued by the Commission. In none of those cases was there

"...any claim that the Commission failed to observe procedural safeguards required by law" *NBC, supra*, 319 U.S. at 225.

Both of Commissioner Fogarty's points, the infrequency of occurrence of the format issue, and the Commission's ability to deal with the issue as it arises, are amply supported by the record.⁸⁵ Both supply independent grounds for the denial of certiorari in this case.

Further, as the Commission recognizes,⁸⁶ there is no possibility of a conflict in the Circuits, since under 47 U.S.C. § 402(b) the D.C. Circuit is

"...the sole forum for appeal from FCC licensing decisions" *WEFM, supra*, 506 F.2d at 266.

This consideration also militates against the need for this Court's review.

⁸⁵ As already stated, in the decade since the decision in *Atlanta*, only four format cases have reached the Court of Appeals, and only one has resulted in a hearing. Since only about "half a dozen" cases raising format change issues are pending before the Commission, the direct impact of *WNCN* is, given the general scale of cases decided by this Court, exceedingly small.

Additionally, the Court of Appeals' enormous solicitude for, and deference to, Commission discretion in making the requisite public interest determination surely makes that statutorily created burden an easily bearable one.

⁸⁶ See FCC Pet. at 14, n. 8.

Conclusion

For the reasons stated above, the petitions for certiorari should be denied.

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February 6, 1980

The authors wish to express their appreciation to Stuart Goldfarb, Michael S. Hassan and Susan Levin for their assistance in the preparation of this brief.

APPENDICES

Appendix A

Dissenting Statement of Commissioner Joseph R. Fogarty

In Re: Decision to Seek Supreme Court Review of
WNCN Listeners Guild v. FCC.

For the following reasons, I dissent to the Commission's decision to seek Supreme Court review of *WNCN Listeners Guild v. FCC*.¹

First, the procedural infirmity inherent in the Commission's failure to afford notice and opportunity for comment on the so-called OPP "Secret Study" is a fatal flaw in any case for certiorari. As Judge Bazelon stated in his Concurring Opinion:

The Commission's failure to make public the staff study that proved so central to its final decision violates fundamental rulemaking principles. As the majority opinion documents, the FCC exhibited an almost cavalier disregard for the public's right to comment on the critical data and methodology supporting the Commission's finding that "market forces had provided a significant even if not perfect amount of diversity." This conclusion in turn is a vital link in the Commission's reasoning underlying its adoption of the *Policy Statement*....the record must be reopened to permit meaningful public participation in the Commission's decision.²

I was unaware of this procedural defect when I first participated in the matter of the *Policy Statement* on reconsideration, and I must agree with the court's concern.

¹ No. 76-1692 (D.C. Cir., en banc, decided June 29, 1979) ("Format Change" Case).

² Concurring Opinion of Bazelon, J. at 1 (footnotes omitted).

Appendix A

Dissenting Statement of Commissioner Joseph R. Fogarty

The failure to give public notice and opportunity for comment on the OPP study was not merely harmless error; that failure goes to the integrity and fairness of the Commission's decision-making process. As Judge Leventhal succinctly observed, this infirmity cannot be remedied by the "repair carpentry" of Commission counsel on appeal.³

Second, on the merits, I believe that if the Commission's statutory mandate to encourage the larger and more effective use of radio in the interest of all the people of the United States⁴ has any substantive meaning, it dictates that the Commission must interest itself in the potential loss of a unique program format which has been responsive to the needs and interests of a substantial segment of the community. Any fair reading of the court's *WNCN* opinion indicates that format change hearings are likely to be few in number and that the Commission retains ample leeway and discretion to avoid any "administrative nightmare" or collision with the First Amendment. If the Commission were now to spend half as much time trying to live with the format change decisions as it has spent trying to circumvent the court's mandate, I have no doubt that we could find satisfactory procedures to minimize the parade of horrors that the *Policy Statement* has conjured up.

Third, I do not believe that *WNCN* and its predecessor cases will have any negative impact on the Commission's intended inquiry into radio deregulation. Reasonably construed, the *WNCN* decision holds that the Commission

³ Concurring Opinion of Leventhal, J. at 2 (footnote omitted).

⁴ 47 U.S.C. 151 and 303(g).

Appendix A

Dissenting Statement of Commissioner Joseph R. Fogarty

must intervene in the broadcast marketplace only where there is an identifiable marketplace failure inimical to the public interest. It is my understanding that this is the reasoned and pragmatic approach that we will be taking in addressing radio deregulation, and I therefore believe that *WNCN* is supportive of, rather than detrimental to, that endeavor.

Finally, it is painfully obvious to me that an overwhelming majority of the Court of Appeals en banc views the Commission's course of conduct with respect to the format change decisions as obstreperous, disrespectful, and in flagrant disregard of the constitutional principle of judicial supremacy. I wish to have no part in this needless and unseemly confrontation.

Appendix B**Statutes Involved**

47 U.S.C. § 309 (a), (d), (e)

Application for license-Considerations
in granting application

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * * *

Petition to deny application; time; contents;
reply; findings

(d) (1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain

Appendix B**Statutes Involved**

specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section.

Hearings; intervention; evidence;
burden of proof

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters

*Appendix B**Statutes Involved*

and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * * * *

47 U.S.C. § 310(d)

Assignment and transfer of construction
permit or station license

(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1979

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, ET AL.,
PETITIONERS

V.

WNCN LISTENERS GUILD, ET AL.

On Petitions For
Writ Of Certiorari To The United States
Court Of Appeals
For The District Of Columbia Circuit

OPPOSITION OF OFFICE OF COMMUNICATION
OF THE UNITED CHURCH OF CHRIST, ET AL.
TO PETITIONS FOR A WRIT OF CERTIORARI

The Office of Communication of the
United Church of Christ, the Mexican
American Legal Defense and Educational Fund,
the National Latino Media Coalition, the
National Council of La Raza, the Bilingual
Bicultural Coalition on Mass Media, the

American G.I. Forum, and Public Communications, Inc., ^{1/} hereby jointly oppose the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review that court's judgment, entered June 29, 1979, in WNCN Listeners Guild v. Federal Communications Commission, Nos. 76-1692, 76-1793 and 77-1951. We understand that WNCN Listeners Guild, petitioner in No. 76-1692, and Classical Radio for Connecticut and Committee for Community Access, petitioners in No. 76-1793, are also opposing the grant of a writ of certiorari.

^{1/} The Office of Communication, a national instrumentality of the United Church of Christ, conducts a ministry in the mass communication media which includes among its concerns the protection of the right of racial and other minorities to broadcast service and the public's right to receive diverse programming from the media. The other respondents are non-profit organizations which have among their concerns the provision of broadcast service to Spanish-speaking persons and other persons with distinct cultural heritages. Respondents, hereinafter referred to as "UCC et al", were petitioners in No. 77-1951.

OPINIONS BELOW

The opinions below are set forth in the Petition filed by the Federal Communications Commission and the United States of America.^{2/}

JURISDICTION

The jurisdictional requisites are adequately set forth in the Government's Petition.

QUESTION PRESENTED

Whether the Communications Act of 1934, read in light of First Amendment goals, includes a concern for diversity of programming so that the potential loss of a unique, financially viable format desired by a significant segment of the listening public is one of the factors bearing on the public interest which the Federal Communications Commission must consider when a radio broadcast license is renewed or transferred?

^{2/} References to the court of appeals' opinion will be cited herein to the material appended to the Government's petition as "FCC App. ____."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves the First Amendment to the United States Constitution and Sections 3(h), 303(g), 309(a), 310(d), 326 and 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§153(h), 303(g), 309(a), 310(d), 326, and 402(b). These constitutional and statutory provisions are set forth in the Appendices to this Opposition.

STATEMENT OF THE CASE

As the court of appeals noted, this case essentially arises from ". . . the common and undivided ownership of the airwaves by all of the people . . ." FCC App. 37a. Thus, while the case is set in the procedural context of review of a Commission Policy Statement (FCC App. 117a, et seq.), it in fact presents the narrow and undisputed premise that diversity is one of the statutory goals of the Communications Act. Acting on this premise, the court of appeals has consistently held, over the repeated opposition of the Commission, that there is a public interest in diversity of entertainment for-

mat. Therefore, the court has held the loss of a unique, financially viable format that serves as a first preference to a significant segment of the public obligates the Commission to consider the public's stated needs and interests in executing its affirmative obligation to find that each renewal or transfer of a broadcast license is in the "public interest, convenience and necessity".

Since the inception of broadcast regulation it has been understood that, while Congress determined to keep the business of broadcasting in the private sector, ownership was to remain with the American people. The Communications Act of 1934 and the Radio Act of 1927 directed the Commission to grant and renew licenses only if the public interest, convenience and necessity will be served thereby. In giving concrete meaning to the public interest standard, both the Federal Communications Commission and its predecessor, the Federal Radio Commission, acted on the assumption that program service was at the heart of the public trusteeship concept and, therefore, a prime factor to be taken into

consideration in its licensing function.^{3/} Central to this analysis was an evaluation of the extent to which the diverse needs, interests, and problems of the community of license were being met by broadcasters. As early as 1928, the Federal Radio Commission, in a formal statement of principles interpreting the public interest clause of the Radio Act of 1927, stated:

. . . The Commission is convinced that the interest of the broadcast listener is of superior importance to that of the broadcaster . . .

The Commission also believes that the public interest, convenience, or necessity will be best served by avoiding too much duplication of programs and types of programs . . . Where one type of service is being rendered by several stations in the same region, consideration should be given to a station which renders a type of service which is not such a duplication.

In view of the paucity of channels, the Commission is of the opin-

^{3/} See Report on Public Service Responsibility of Broadcast Licenses (1946) and Report re En Banc Programming Inquiry, 44 F.C.C. 2303 (1960).

ion that the limited facilities for broadcasting should not be shared with stations which give the sort of service which is readily available to the public in another form.^{4/}

The following year, the Federal Radio Commission enlarged on what it ~~it~~ called a "principle of nondiscrimination" as a basic formula for evaluating the public interest performance of broadcasting stations: ". . . [T]he entire listening public within the service area of a station, or of a group of stations in one community, is entitled to service from that station or stations."^{5/} Although the Commission recognized that this did not mean that each person was entitled to his exact programming preference, it did mean that ". . . the tastes, needs, and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program."^{6/}

^{4/} Federal Radio Commission Annual Report, 166, 167-168 (1928) (hereinafter "FRC Ann. Rep.")

^{5/} The Great Lakes Statement, 3 FRC Ann. Rep., 32 (1929).

^{6/} Ibid. The Commission's description of such a program included ". . . entertainment (cont. on next page)

The Federal Communications Commission continued to emphasize its predecessor's requirement that broadcast licensees, in order to fulfill their statutory obligations, must present, either individually or jointly, programming sufficiently diverse and balanced to meet the tastes, needs, and desires of the significant segments of the community of license. This emphasis was the underlying premise of all subsequent Commission pronouncements on programming policy up until the Commission's Policy Statement on entertainment formats, vacated by the court of appeals.^{7/}

6/ (cont. from previous page)

consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions, weather, market reports and news, and matters of interest to all members of the family . . ." Ibid.

7/ See First Report of the Federal Communications Commission to Congress Pursuant to Sec. 307(c) of the Communications Act of 1934 (1935); Report on Public Service Responsibility of Broadcast Licensees, at 10, 13, 58 (1946); Report re En Banc Programming Inquiry, 44 F.C.C. 2303, 2316 (1960); Primer on Ascertainment of Community Problems by Broadcast Renewal Applicants, 57 F.C.C. 2d 418 (1976); Ascertainment of Community Problems by Non-Commercial Educational Broadcast Applicants, 58 F.C.C. 2d 526 (1976).

The FCC's abrupt change and denial of any concern with radio formats can only be fathomed in light of the changes in the nature of formats that the radio industry undertook in the 1960's in response to advertisers' switch to television:

Faced with declining revenues and declining audiences radio was forced to find and adopt new methods . . . [A]nother change in radio formats began to be instituted, "vertical programming." As long as competing radio stations were playing essentially the same music and appealing to the same audience, there was little to distinguish one station from another -- little reason for advertisers to choose among stations. . . . [S]tations found that they could appeal to a particular identifiable audience and consequently that advertisers would know who would be reached by advertising messages. "Vertical programming" is simply the broadcasting of one type of music, or news, to appeal to a particular audience segment.

With the adoption of vertical programming came the end of the radio station that broadcast a range of offerings to have wide appeal. . . . Many observers believe that this loss of the broadly programmed stations greatly diminished the importance of radio and its ability

to serve the public interest. The problem was that radio was caught in the explosion of television and no one thought much about radio's contribution to the public interest in the excitement of the time. . . . Each station tries to win a loyal following and advertisers know who is being reached.^{8/}

Thus, what was novel at the commencement of the 1970's was not the concept that the FCC should be concerned with the nature of entertainment programming presented by licensees, for the Commission had repeatedly emphasized the public interest considerations therein in the context of its interpretation of "well-balanced responsive programming." Similarly, the public's need for that sort of programming had not been altered. What was novel was the overwhelming departure of broadcasters from the well-balanced format to the specialized format in order to capture advertising dollars.

^{8/} L. Morrisett, Radio - USA, 6 (Reprinted from the 1975/76 Annual Report of The John and Mary R. Markel Foundation, 50 Rockefeller Plaza, New York, New York).

The regulatory implications of this economically inspired change were examined by the Court of Appeals for the District of Columbia Circuit in a series of cases^{9/} culminating in an en banc decision in Citizens Committee To Save WEFM v. FCC, 165 U.S. App. D.C. 185, 506 F.2d 246 (1974) (hereinafter "WEFM"). These cases were brought by listeners' groups challenging Commission approval of assignment and transfer applications which involved substantial changes in program formats. In WEFM, the Court reviewed its prior decisions which applied the Communications Act's public interest mandates (Sections 309(a) and 310(d)), and the Commission's statutory obligation under Section 303(a) to "encourage the larger and more effective use of

^{9/} Citizens Committee to Preserve the Voice of Arts in Atlanta v. FCC, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970); Hartford Communications Commission v. FCC, 151 U.S. App. D.C. 354, 467 F.2d 408 (1972); Lakewood Broadcasting Service, Inc., v. FCC, 156 U.S. App. D.C. 9, 478 F.2d 919 (1973); Citizens Committee to Keep Progressive Rock v. FCC, 156 U.S. App. D.C. 16, 478 F.2d 926 (1973). The timing of these cases is directly linked to the decision in Office of Communication of (cont. on next page)

radio", "by its terms and as read by the Supreme Court."^{10/} The WEFM Court reaffirmed that ". . . there is a public interest in diversity of broadcast entertainments."^{11/}

It noted that ". . . most format changes . . . do not diminish the diversity available, and 'are thus left to the give and take of each market environment and the business judgement of the licensee.'"^{12/} Where the format proposed to be abandoned was allegedly unique, financially viable, and there was significant public outcry, its loss would affect diversity and the Commission must consider this

^{9/} (cont. from previous page)

the United Church of Christ v. FCC, 123 U.S. App. D.C. 328, 359 F.2d 944, 1005 (1966), which reversed the Commission's position that listeners and viewers did not have standing to bring challenges in Commission licensing proceedings.

^{10/} WEFM, at 368, 34.

^{11/} WEFM, at 261.

^{12/} Id., at 261, quoting Citizens Committee to Preserve Voice of Arts in Atlanta v. FCC, 141 U.S. App. D.C. 109, 436 F.2d 263 (1970).

factor, along with other public interest factors, in reaching its public interest determination. If there were substantial questions of fact, inadequate data, or unresolved public interest issues, the Commission was obligated to hold a hearing pursuant to §§309(a), (d), (e) and 310(d) of the Act.

THE COMMISSION PROCEEDING

On January 19, 1976, the Commission issued a Notice of Inquiry (FCC App. 60a, et seq.) to consider "its policies and practices with respect to changes in the entertainment formats of broadcast stations." ^{13/} FCC App. 60a. The Notice restated the "Additional Views of Chairman Burch" (FCC App. 61a-62a), which had been considered and rejected by the Court in WEFM, in the course of posing the questions

^{13/} The Commission did not reach this conclusion without first considering further court review of the WEFM opinion. A review of documents obtained from the Commission in response to a Freedom of Information Act Request filed by Citizens Communications Center revealed that the Commission went to the extent of preparing a draft petition to this Court for Writ of Certiorari. Letter from Wallace A. Johnson, Chief, Broadcast Bureau to Charles M. Firestone, re: FOIA Request 20682. Apparently, at that time, the Com-
(cont. on next page)

which were to be the subject of the inquiry: whether the public interest standard requires close scrutiny of format changes to assure appropriate diversity and whether the First Amendment permits such a judgment? FCC App. 65a.^{14/} The Commission's view was that format regulation may not be something that "can realistically be achieved"; would require "pervasive governmental regulation" with "adverse consequences for the public interest" (FCC App. 65a); that "the search for the public interest in entertainment formats may be a difficult and ultimately futile exercise" (FCC App. 66a); and that selective review of proposed format changes was an administrative "guagmire" to be avoided in "the absence of a compelling public interest need." FCC App. 67a.

13/ (cont. from previous page)

mission did not think it had the requisite record for a successful endeavor.

14/ For those who favored strict compliance with the Act's public interest mandate, the Commission propounded a series of questions seeking views on when the Commission should become involved; whether there should be format categories; what "burdens" should be placed on demonstrating uniqueness; what (cont. on next page)

In a concurring statement, former Commissioner Benjamin L. Hooks recognized that, despite the difficulties, "the final responsibility of assuring service to all segments of the community may ineluctably abide" with the Commission. FCC App. 79a.

. . . [T]he issue here settles neither on free speech nor on a free market. The issue is whether the right of minority audiences are subordinate to the entrepreneurial quest for profit maximization. We are not naive enough to suppose that formats are changed for any altruistic purpose.

Chillingly boundless are the number of hypothetical extremes to which the court's doctrine could be taken if extrapolated to logical absurdities.

14/ (Cont. from previous page)

format; if a format is unique, what consideration should be given to similarity, population, other areas served, audience, and hours of operation; how the burden of proof should be allocated; when a proposal should require a hearing; when a change in format should be considered (e.g., at renewal, assignment, etc.); and whether maximization of program diversity is necessarily in the public interest. FCC App. 70a-71a.

However, I believe a common sense interpretation of the judicial is preferable . . . [O]ur energies would be best spent, I believe, in devising tenable standards to apply rather than battling speculative aberrations. FCC App. 81a-82a [footnote omitted].

On July 30, 1976, the Commission issued its Memorandum Opinion and Order, 60 F.C.C. 2d 858 (1976) (hereinafter "Policy Statement"). FCC App. 117a, et seq. The only substantive addition distinguishing the Policy Statement from the previously repudiated "Addition Views of Chairman Burch" and the Notice of Inquiry^{15/} was a staff study (the existence of which was kept from the public) which the Commission believed to be supported by the "Owen Study". The latter had been commissioned by the industry trade

^{15/} While in the Notice of Inquiry, the Commission had sought the views of others, it did not, in fact, rely on the filings for its conclusion. Instead, in Appendix A to the Policy Statement (FCC App. 135a), it provided a "Summary of Comments" in which it selectively undertook a look at the citizen and public interest comments and the comments of broadcasters. Significantly, it avoided all discussion of comments which were responsive to how administrative and First Amendment entanglements, if any, could be avoided or minimized.

organization. These studies, the Commission found demonstrated that while the ". . . market for radio advertisers is not a completely factual mirror of the listening preferences of the public at large . . ." (FCC App. 128a), marketplace forces were ". . . the best available means for producing the diversity to which the public is entitled . . .". FCC App. 128. These findings led the Commission to renounce its former commitment to ". . . take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming . . .". FCC App. 134a. Instead, the Commission arrived at the historically startling conclusion ". . . that such a position is neither administratively tenable nor necessary in the public interest." FCC App. 134a, n.8. It was on this basic position that Commissioner Hooks dissented from the Policy Statement because:

. . . Without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces. The Commis-

sion's role in the commercial regulatory structure is well defined. FCC App. 171a [footnote omitted].

All Petitions for Reconsideration were denied by the Commission. Memorandum Opinion and Order, 66 F.C.C. 2d 78 (1977) (FCC App. 176a).^{16/}

THE COURT OF APPEALS DECISION

The Petitioners in this Court seek review of an en banc decision of the court of appeals holding that " . . . the Communications Act's public interest, convenience, and necessity standard includes a concern for di-

^{16/} UCC et al filed one of the petitions for reconsideration denied by the Commission, noting that while most Hispanic-Americans were bilingual, many Hispanics regarded Spanish as their primary language and the small amount of Spanish programming presently available might be the only broadcast service directed to the needs of the Latino or Mexican-American community. Particularly, in the area of foreign language programming, the entertainment format may be the only viable broadcast vehicle for informational and public affairs programming. Pointing to census figures that indicated that Hispanic-Americans are economically disadvantaged, the petition noted the grave risk that Spanish programming might not always command the greatest advertiser support because Spanish-speaking persons generally have little purchasing power and may thus be less attractive to advertisers.

verse entertainment programming . . .".^{17/} FCC App. 4a-5a. That decision vacated the Commission's 1976 Policy Statement which held that under no circumstances was the Commission statutorily obligated to consider in a licensing proceeding the public interest implications of the loss of service to a substantial segment of the listening public occasioned by the abandonment of a unique, financially viable format.

The court noted that " . . . Congress set aside the radio spectrum as a public resource and acted to secure its benefits, not only to those in the cultural mainstream, but to 'all the people'. "^{18/} It concluded that the Commission " . . . must sometimes consider the loss of diversity (together with other factors bearing on the public interest) when deciding assignment applications involving abandonment of existing formats . . . " (FCC App. 5a) in making its statutorily man-

^{17/} Communications Act of 1934 §§309(a), 301(b), 47 U.S.C. §§309(a), 310(d).

^{18/} Quoting National Broadcasting Co. v. United States, 319 U.S. 190, 216-17 (1943) [emphasis by the court of appeals].

dated public interest determination.^{19/}

Because the court's decision was dictated by a statutory and constitutional interpretation clearly and irreconcilably at odds with that of the Commission (FCC App. 4a-5a, 32a-33a), the court declined to adopt the fruitless procedure of merely remanding the proceeding to the agency so that certain crucial procedural errors inherent in the Policy Statement could be corrected. Nevertheless, the court was greatly troubled by the Commission's procedural unfairness (FCC App. 14a-17a)^{20/}, and the Commission's "sometimes drastic misreading" of the prior format

^{19/} The Court noted, however, that the public interest implications of format abandonment need not be considered when the loss in diversity is not serious or the assignment clearly satisfies other public interest considerations. FCC App. 5a-6a.

^{20/} However, Judge Bazelon believed that the Commission's failure to make public a staff study which was central to its decision and its "almost cavalier disregard for the public's right to comment on the critical data and methodology" "violate[d] fundamental rulemaking principles" and required vacating the Policy Statement. FCC App. 41a. On this ground he concurred in the majority's decision.

cases. FCC App. 23a.

The court took great pains to explore the limited holding of its format decisions. It noted its repeated emphasis that " . . . WEFM was not intended as an alternative to format allocation by market forces . . . " (FCC App. 24a [emphasis in original]), but rather, recognized, as did the Commission, that the " . . . radio market is an imperfect reflection of listener preferences." FCC App. 24. Thus, " . . . [t]he Commission's obligation to consider format issues arises only when there is strong prima facie evidence that the market has in fact broken down . . . " FCC App. 24a.

In reviewing the Commission's "administrative nightmare" argument, the court noted that only one format case had resulted in a hearing (FCC App. 19a); that counsel for the Commission conceded that the " . . . 'administrative nightmare' characterization was an 'exaggeration' and not 'very significant at all' . . . " to the Commission's decision (FCC App. 20a); and that " . . . any system of pervasive regulation of the type envisaged by the Commission would indeed be an administrative nightmare . . . ". FCC App. 24a [emphasis

added]. Similarly, the court examined the Commission's contention that WEFM would have an unconstitutionally chilling and intrusive effect on licensee programming, noting that the Commission provided no evidence to sustain that contention and that its staff report concluded that " . . . under the WEFM regime licensees have been aggressive in developing diverse entertainment formats." FCC App. 25a.

Finally, the Court emphasized that it could not dictate "what, if any, standards the Commission should adopt" (FCC App. 28a), for only the Commission had the power " . . . to determine how to perform its regulatory function within the substantive and procedural bounds of applicable law." FCC App. 27a. The court further emphasized " . . . the Commission's discretion to develop administrative standards, and stressed that judicial review thereof will be limited and deferential . . .". FCC App. 28a [footnotes omitted].

REASONS FOR DENYING THE WRIT

I. REVIEW SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY DECIDED THE STATUTORY QUESTIONS AND THERE IS NO POSSIBILITY OF CONFLICT IN DECISIONS.

- A. The Court Of Appeals, Consistent With The Communications Act And This Court's Decisions, Correctly Decided That There Is A Public Interest In Diverse Entertainment Programming And That The Commission Cannot Abdicate Its Statutorily Imposed Obligation To Make Affirmative Public Interest Determinations.

The court of appeals held that the public interest, convenience and necessity standard of the Communications Act includes a concern for diverse entertainment programming. FCC App. 4a-5a. Petitioners attempt to characterize the court's holding as a policy determination, rather than a statutory interpretation, because the court relied on the "general" statutory language of the Act's public interest mandate. However, the court of appeals' interpretation of the statute is fully consistent with, and indeed compelled by, this Court's interpretation of the Act's public interest standard, in addition to other statutory provisions. It is the Commission's rejection of those statutory obligations which is inconsistent with teachings of this Court.

The initial decisions of this Court review-

ing the agency's regulatory role clearly established that the standard governing the exercise of the Commission's licensing power was the Act's public interest clauses. Early on, this Court rejected the contention that the general language of these clauses compelled a restrictive interpretation of the Commission's regulatory responsibilities and authority.

The Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication . . . [The Act] does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. ^{21/}

The congressional touchstone was the public interest standard, a criterion which " . . . is as concrete as the complicated factors for judgment in such a field of delegated authority permit."^{22/} The public interest to be served has

^{21/} National Broadcasting Company v. United States, 319 U.S. 190, 215-216 (1943).

^{22/} Ibid., quoting Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 138, (1940).

been defined consistently in terms of service to the listening public and its interest in "the larger and more effective use of radio."^{23/} An important element of the licensing evaluation is ". . . the ability of the licensee to render the best practical service to the community reached by his broadcasts."^{24/} Reading the various provisions of the Act, this Court concluded that the ". . . aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States",^{25/} and to achieve this end, the Commission was given a "comprehensive mandate."^{26/} In Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 390 (1968) (hereinafter "Red Lion"), this Court affirmed the ". . . right of the public to receive suitable

^{23/} Ibid., citing Section 303(g) of the Act, 47 U.S.C. §303(g).

^{24/} Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940) (hereinafter "Sanders Bros.").

^{25/} National Broadcasting Company, 319 U.S., at 217.

^{26/} Id., at 219.

access to social, political, esthetic, moral, and other ideas and experiences . . ." In its format holdings, the court of appeals relied on such cases interpreting the provisions of the Communications Act in holding that there is a public interest in diversity of entertainment formats.

Petitioners cite neither statutory authority nor decisions of this Court which suggest the contrary. Rather, petitioners seem to suggest that the public interest standard is a statutory step-child. Significantly, the Commission concedes that there is a "statutory objective of program diversity". FCC Pet., at 19, n.14. See also Id. at 7, 16. The Commission's argument is that once it determined that marketplace forces do work to produce diversity most of the time, it was relieved of any statutory obligation to make a public interest determination, even when there was evidence or questions of marketplace failure depriving a significant segment of the public of desired broadcast service. FCC App. 128a, 138a, n.8.

The court of appeals simply held that the Commission could not abdicate to the marketplace its statutory responsibility to make an affirma-

tive public interest determination.^{27/} Where a significant segment of the public complains about a loss of service, that community outcry becomes a public interest issue which the Commission must consider pursuant to Sections 309 and 310. If substantial and material questions of fact are presented, or the Commission is for any reason unable to make an affirmative public interest finding, then, pursuant to Section 309(e) of the Act, it must hold a hearing. The court of appeals did not presume to tell the Commission what weight should be accorded the loss of diversity factor in balancing the various other public interest criteria. It acted only to "assure itself that the Commission [would give] reasoned consideration to each of the pertinent factors."^{28/} See also Citizens Communications Center v. FCC, 145 U.S. App. D.C. 32, 447 F.2d 1201 (1971).

27/ Federal Communications Commission v. RCA Communications Inc., 346 U.S. 86, 93-94, 97, (1953); National Broadcasting Co. v. United States 319 U.S., at 215-216; Sanders Bros., 309 U.S. at 476; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S., at 137.

28/ Permian Basin Area Rate Cases, 390 U.S. 747, 792 (1968).

B. The Court Of Appeals Correctly Determined That The Legislative History Of The Act Did Not Prohibit Commission Consideration Of Loss Of Service To A Significant Segment Of The Listening Public As Part Of The Statutorily Mandated Public Interest Determination.

The industry petitioners contend that various remarks made in the course of enacting the Radio Act of 1927 and the Communications Act of 1934 confirm that Congress deliberately denied the Commission the power to consider such elements of service as entertainment programming. See ABC Pet., at 14-15; INSILCO Pet., at 20-21; NAB Pet., at 15-16 n.19. The argument is overdrawn in all the petitions. At the time of passage of the Act, and in the years preceding, there were various legislative attempts to allocate broadcast facilities to various special uses -- educational, religious, agricultural, labor, cooperative -- first, under the so called Hess bill, and later under the Wagner-Hatfield bill. Neither attempt was successful. Instead, the FCC was directed by Congress to hold hearings on the reserved channel concept and report back to Congress. The notion of reserved channels was clearly not renounced by Congress. All of the petitions before the Court contain parts

of the debate.^{29/}

It is not surprising that the Commission does not here advance the industry's view of this question. The Commission historically has had a different opinion of the scope of its authority, and has read the legislative history (selectively relied on by the other petitioners) to reach a contrary interpretation of its mandate -- an interpretation fully substantiated by that legislative history. Thus, in its Report on the Public Service Responsibility of Broadcast Licensees (1946) ("The Blue Book"), the Commission stated:

In the course of the discussion of the 1934 Act, an amendment to the Senate bill was introduced which required the Commission to allocate 25 percent of all broadcasting facilities for the use of educational, religious, agricultural, labor, cooperative and similar non-profit-making organizations. Senator Dill, who was the sponsor in the Senate of both the 1927 and 1934 Acts, spoke against the amendment,

29/ A full description of this history is provided in E. Barnouw, The Golden Webb, A History of Broadcasting in the United States Volume II-1933 to 1953, 22-28 (1968). See also Id., at 293-295 for discussion of the Commission's action in reserving educational television channels without seeking additional legislative authority.

stating that the Commission already had the power to reach the desired ends (78 Cong. Rec. 8843):

"The difficulty probably is in the failure of the present Commission to take the steps it ought to take to see to it that a larger use is made of radio facilities for educational and religious purposes.

* * * * *

"I may say, however, that the owners of large radio stations now operating have suggested to me that it might be well to provide in the license that a certain percentage of the time of a radio station shall be allotted to religious, educational, or non-profit users."

Senator Hatfield, a sponsor of the amendment,

"I have no criticism to make of the personnel of the Radio Commission, except that their refusal literally to carry out the law of the land warrants the Congress of the United States writing into legislation the desire of Congress that educational institutions be given a specified portion of the radio facilities of our country." [Emphasis by the Commission].

The amendment was defeated and Section 307(c) of the Act was substituted

which required the Commission to study the question and to report to Congress its recommendations.

In its Report to Congress, the Commission represented that the " . . . present legislation has the flexibility essential to attain the desired ends without necessitating at this time any changes in the law. There is no need for a change in the existing law to accomplish the helpful purposes of the proposal."^{30/}

C. The Court Of Appeals' Decision Does Not Conflict With Section 3(h) Of the Communications Act.

Section 3(h) of the Communications Act, 47 U.S.C. §153(h), provides that " . . . a person engaged in radio broadcasting shall not . . . be deemed a common carrier." The Commission asserts that the lower court's interpretation of the agency's mandate to make a public interest determination as to format changes pursuant to Sections 393(g), 309 and 310 of the Act transgresses Section 3(h)'s prohibition against imposing common carrier obligations upon broadcasters. FCC Pet., at 13, 17. See also ABC Pet., at 13, 16-17; NAB Pet., 15 n.18. In an

^{30/} First Report of the Federal Communications Commission to Congress Pursuant to Sec. 307(c) of the Communications Act of 1934 (1935).

effort to create a controversy of sufficient gravity to warrant this Court's review, the Commission has proposed a construction of Section 3(h) far beyond anything this Court has previously suggested.

This Court recently addressed the scope of Section 3(h) in Federal Communications Commission v. Midwest Video Corp., 440 U.S. 689 (1979) (hereinafter "Midwest Video"). There, relying upon CBS v. DNC, the Court stated that:

. . . [Section] 3(h) embodies a substantive determination not to abrogate a broadcaster's journalistic independence for the purpose of, and as a result of, furnishing members of the public with media access . . .

* * * * *

. . . the purpose of the provision and its mandate wording precludes Commission discretion to compel broadcasters to act as common carriers, even with respect to a portion of their total services. Midwest Video, 440 U.S., at 706, n.15 [emphasis added].

Nothing in the court of appeals' construction of Sections 303(g), 309 and 210 conflicts with the foregoing. The requirement that the Commission make a public interest determination regarding the proposed abandonment of a unique, financially viable format, in the face of a numerically

significant public outcry from responsible members of the community, does not result in " . . . furnishing members of the public with media access . . .". Midwest Video, at 706, n.15.^{31/} All that would conceivably be required is that if, in the final analysis, the proposed format switch under consideration would be clearly detrimental to the public interest, the Commission would, in the exercise of its discretion, have to fashion an appropriate remedy. The court of appeals, consistent with this Court's rulings in Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) (hereinafter "NCCB"), and Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) (hereinafter "Vermont Yankee") studiously avoided dictating to the Commission the nature or scope of such a remedy. See e.g., FCC App. 27a-32a.

^{31/} To function as a common carrier, a broadcaster would have to be compelled to make a " . . . public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing . . .". Midwest Video at 701.

The decision below is also consistent with Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) (hereinafter "CBS v. DNC"), and Sanders Bros. The latter case held that " . . . economic injury to a rival station is not, in and of itself, and apart from considerations of public interest, convenience, or necessity, an element the [Commission] must weigh . . . in passing on an application for a broadcasting license." Sanders Bros., 309 U.S. at 473. This is in "contradistinction" to the Commission's obligations under the common carrier provisions of the Act. Id., at 474. [B]roadcasters are not common carriers and are not to be dealt with as such . . .". Ibid. [footnote omitted]. "Plainly it is not the purpose of the Act to protect a licensee against competition [from a fellow broadcaster] but to protect the public . . .". Id., at 475.

CBS v. DNC held that " . . . Congress pointedly refrained from divesting broadcasting of their control over the selection of voices [to be broadcast over their licensed frequency]; S3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public . . .". CBS v. DNC, at 116. See also Midwest Video, 440 U.S., at 706, n.15.

this Court prefaced that pronouncement by emphasizing that " . . . it is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC. Red Lion, supra, at 390." CBS v. DNC, at 102. Just as clearly, that right may not be rendered illusory by the artificial and overbroad construction of Section 3(h) proposed by the Commission.

Nothing in Midwest Video, CBS v. DNC or Sanders Bros. even suggests the interpretation of Section 3(h) advanced by the Commission. To insure that the abandonment of a unique, financially viable format, in the face of significant, responsible public outcry, is not injurious to the public interest does no violence to this Court's prior rulings. It would be extreme redundancy for this Court to have to again reaffirm the basic notion underlying the Communications Act that a licensee's programming discretion ends where the public's First Amendment rights are injured by an exercise of that discretion. CBS v. DNC; Red Lion.

D. The Court Of Appeals' Decision Does Not Conflict With Section 326 Of The Communications Act.

Section 326 of the Communications Act, 47 U.S.C. §326, prohibits the Commission from exercising any "power of censorship" or other interferences "with the right of free speech" over the public airwaves. Insofar as that provision restates basic First Amendment concerns specifically as to broadcasting, the consistency of the lower court's decision with those concerns is addressed infra, at 39-45. To the extent that Section 326 stands independently, this Court's recent decision in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978) (hereinafter "Pacifica"), defeats the petitioners' claim that the decision below conflicts with Section 326. See e.g., FCC Pet., at 18; ABC Pet. at 15; NAB Pet., at 20, 22; INSILCO Pet., at 21.

In Pacifica, this Court approved the Commission's censure of a licensee who had broadcast an "indecent" program segment in violation of 18 U.S.C. §1464. In validating this governmental intrusion into what, in a non-broadcasting context, would have been considered protected speech, Pacifica, at 748-751, the Court held that:

[t]he prohibition against censorship unequivocally denies the Commission any power to edit proposed broadcasts in advance and to excise material considered inappropriate . . . Id., at 735 [emphasis added].

Here, the court below has not ordered the Commission to either "edit", "excise" or otherwise determine whether a licensee's proposed programming is "inappropriate for the airwaves" Ibid. Rather, it was held that when called upon by a significant, responsible segment of the public, the Commission must determine whether the mandate of Sections 303(g), 309 and 310 will be met by the abandonment of a unique, financially viable format. Neither censorship, prior restraint nor the Commission's subjective programming preferences enter into the question. The Commission's basic administrative discretion to resolve the issue in the least restrictive manner possible, consistent with the public interest, has not been altered. See FCC App. 27a-32a. This is consistent with NCCB and Vernon Yankee. Only by the Commission's affirmative exercise of its obligation to make a public interest determination can a licensee's discretion under the Act, to select his own programming within the parameters of the public interest, be

constitutionally squared.^{32/} Pacifica, at 748;
CBS v. DNC, at 110, 117. There is no incompata-
 bility between the decision below and Section 32:

32/ The Commission has, in the past, never been troubled by imposing what might otherwise be characterized as prior restraints on licensees by approving or rejecting not merely general formats (unique or otherwise) but individual programs. See e.g., Prime Time Access Rule, 47 F.C.C. 2d 769 (1973) (a waiver of the Prime Time Access Rule was granted to permit the broadcast of National Geographic programs, because they were of distinctive character); 43 F.C.C. 2d 269 (1973) (approval for the same reason granted for the second time); Prime Time Access Rule, 43 F.C.C. 2d 462 (1973) (a waiver was granted to show reruns of America because of significant public interest in the series); Prime Time Access Rule, 48 F.C.C. 2d 208 (1974) (Hogan's Heroes was denied a waiver because substantial popularity was not a good reason); Prime Time Access Rule, 43 F.C.C. 2d 470 (1973) (the Reasoner Report warranted a waiver); Prime Time Access Rule, 45 F.C.C. 2d 512 (1974) (Animal World warranted a waiver).

See also Ascertainment of Community Problems by Broadcast Applicants, 57 F.C.C. 2d 418 (1976) (where the Commission stated that it would review a renewal applicant's proposed program offering vis-a-vis the stated concerns of the community to determine, in accordance with the public interest standard, whether the licensee's programs would be responsive to community needs and interests). See also Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962).

II. THE COURT OF APPEALS FULLY CONSIDERED THE RELEVANT CONSTITUTIONAL QUESTIONS PRESENTED AND CORRECTLY CONCLUDED THAT A PUBLIC INTEREST DETERMINATION IN CASES OF CHALLENGED FORMAT CHANGES IS NECESSARY TO REMAIN CONSISTENT WITH FIRST AMENDMENT GOALS.

The Commission claims to be aggrieved by the alleged " . . . failure of the court of appeals to give adequate consideration to the constitutional implications of its holding . . ." FCC Pet., at 23. Consistent with its position below, the Commission does not assert that the statutory requirement set out by the lower court itself transgresses the First Amendment. Rather, the Commission speculates that any serious attempt to implement that mandate will have dire ramifications ultimately inconsistent with the First Amendment.^{33/} FCC Pet., 23-25. The industry parties on the other hand, as in the court below, find the basic notion of making a public interest determination re-

33/ That the Commission's "parade of horrors" is speculative cannot be contradicted. It concedes that it was never called upon to implement the statute's mandate prior to the format cases of the 1970's and similarly admits that its efforts in the instant case have been directed solely at avoiding that mandate.

garding any format change constitutionally abhorrent, irrespective of the necessity of such an obligation under the Communications Act. See ABC Pet., at 18-24; NAB Pet., at 20-24; INSILCO Pet., at 17-20. This divergence of opinion between the petitioners—especially considering the regulatory agency's refusal to claim an immediate First Amendment violation inherent in the lower court's analysis—militates against review by this Court at this time.^{34/}

The Commission raises the spectre of a "chilling effect" resulting from any effort by it to make a public interest determination in challenged format change cases. It claims that the possibility of even minimal Commission oversight would deter a broadcaster from pursuing new advertising revenues thought to be avail-

^{34/} Indeed, given the petitioners' strenuous allegation that the court below did not seriously consider the constitutional issues, it is questionable whether this court ought to now assume jurisdiction over this issue. Assuming arguendo, that there is any merit to the petitioners' claims, it would be far more appropriate to review an actual incident of alleged First Amendment violation, rather than the instant speculative assertions.

able to stations with formats other than the one he is currently broadcasting, or, indeed, that he might be deterred from experimenting with a totally new, unique format. FCC Pet., at 23-24. See also ABC Pet., at 23; NAB Pet., at 22.

Further, the Commission asserts that any serious attempt to address this question would result in the Commission making qualitative judgments regarding programming. FCC Pet., at 24. See also ABC Pet., at 21; NAB Pet., at 21-22. This is branded by the industry as "intrusive governmental regulation" (see e.g., ABC, Pet., at 20), resulting, quite possibly, in prior restraint. See, e.g., NAB Pet., at 20. All of these alleged chilling effects, intrusive regulations and prior restraints are claimed to violate this Court's First Amendment teachings set down in CBS v. DNC^{35/} and Red Lion.^{36/}

As this Court noted in Red Lion, the Commission's statutory obligation to regulate in the public interest is an affirmative one. The Com-

^{35/} See FCC Pet., at 24; ABC Pet., at 20; NAB Pet., at 21; INSILCO Pet., at 19-20.

^{36/} See NAB Pet., at 24; INSILCO Pet., at 19-20.

mission must " . . . assure that broadcasters operate in the public interest. . . ." Id., 395 U.S., at 380. See also Id., at 379 (citing 47 U.S.C. §§303, 303(r), 307(a) and 309(a)). The Commission " . . . neither exceed[s] its power under [the Communications Act] nor transgress[es] the First Amendment in interesting itself in general program format and the kinds of program broadcast by licensees. National Broadcasting Co. v. United States, 319 U.S. 190 (1943)." Id., at 395.

This power to "invade" what the petitioners have categorized as a licensee's exclusive First Amendment domain was found to be central to the Act's regulatory scheme and fully compatible with the First Amendment. The Court found it " . . . idle to posit an unabridgeable First Amendment right to broadcast . . . " Red Lion, at 388. " . . . [A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." Id., at 389.

Thus, the lower court's holding that a statutory public interest determination must be made when a format change is challenged is far from being offensive to the First Amendment. This Court stated that it is " . . . the right of

the viewer and the listeners, not the right of the broadcasters, which is paramount . . . , and that " . . . that right may not be constitutionally abridged either by Congress or by the FCC . . . ". Red Lion, at 390.^{37/} The instant statutory requirement that the Commission make a public interest finding as to the abandonment of a unique, financial, viable format upon the petitioning of a significant segment of the community is thus constitutionally permissible, if, indeed, not mandated.

This Court's holding in CBS v. DNC is not to the contrary. There, the Court held inter alia, that the public's First Amendment rights in the area of programming addressed to controversial issues of public importance were sufficiently safeguarded by the Fairness Doctrine. Thus, mandatory, paid access to the airwaves by members of the public was not constitutionally compelled.

Reaching that conclusion, in almost total reliance upon Red Lion, the Court noted that

^{37/} See also Sanders Bros., 309, at 475; Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 361-362 (1955); 2 Z. Chaffee, Government and Mass Communications 546 (1947).

Congress had long-ago opted for a regulated rather than a free-market system of broadcasting. CBS v. DNC, 412 U.S., at 110.^{38/} The necessary result of that congressional determination was to require that the Commission determine that programming (past and proposed) is in the public interest when passing upon license renewal or transfer applications. This was found to be the basic enforcement mechanism in the regulatory scheme. Id., at 110. Further, this Court noted that the Commission's role as " 'overseer'" and "ultimate arbiter" in those instances where a licensee had abandoned the public interest in favor of his own. This is constitutional quid pro quo of the regulatory scheme where, in the first instance, licensees are afforded programming discretion. Id., at 117. The public's outcry, when its paramount First Amendment rights are being sacrificed by a licensee, is the trigger for that enforcement mechanism. Id., at 110. The Commission cannot

38/ While broadcasters are free—indeed compelled—to compete against one another for advertising revenue, Sanders Bros., they cannot compete in any manner detrimental to the paramount First Amendment rights of the public. Red Lion

shrink from its statutory obligation to insure that the public interest is being served in the face of the public's claim that its interests are being abandoned, "no matter how difficult the task." Id., at 120.^{39/} See also Federal Communications Commission v. RCA Communications, Inc., 346 U.S. 86, 93-94, 97 (1953).

The petitioners' claim that the lower court's conclusions are inconsistent with CBS v. DNC is illusory. Rather than relegating the public's paramount First Amendment rights to the unbridled discretion of broadcasters, CBS v. DNC specifically prohibits such a result. The Commission must determine whether the programming decision of broadcasters are in the public interest when significant, responsible segments of the public complain of the proposed abandonment of a unique, financially viable format. This Court's review of such a conclusion is clearly not warranted.

39/ This conclusion is, of course, fully consistent with this Court's decision in Pacific. See supra, at 36-38.

CONCLUSION

For the foregoing reasons it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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February 6, 1980

Counsel wish to acknowledge the assistance in the preparation of this opposition of Citizens Communications Center legal interns, Kim Comart and Floyd J. Miller.

APPENDIX

1a

APPENDIX A

Relevant portions of the Constitution
of the United States are reproduced below:

Amendment I provides:

Congress shall make no law respecting an
establishment of religion, or prohibiting the
free exercise thereof; or abridging the
freedom of speech, or of the press; or the
right of the people peaceably to assemble,
and to petition the government for redress
of grievances.

2a
APPENDIX B

Relevant portions of the Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended, 47 U.S.C. 151, et seq., are reproduced below:

Section 3(h), 47 U.S.C. 153(h) provides:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 303(g), 47 U.S.C. 303(g), provides:

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall-

* * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

3a
Section 309 (a), 47 U.S.C. 309(a) provides:

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 310(d), 47 U.S.C. 310(d), provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the

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proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 326, 47 U.S.C. 326, provides:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 402(b), 47 U.S.C. 402(b), provides:

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application

5a

is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-826, 79-827

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,
NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

**JOINT REPLY TO OPPOSITIONS TO
PETITIONS FOR WRITS OF CERTIORARI**

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WNCN LISTENERS GUILD, *et al.*,
Respondents.

JOINT REPLY TO OPPOSITIONS TO
 PETITIONS FOR WRITS OF CERTIORARI

This reply brief is submitted jointly by American Broadcasting Companies, Inc., CBS Inc., Metromedia, Inc., National Radio Broadcasters Association (Petitioners in No. 79-826), National Association of Broadcasters, National Broadcasting Company, Inc., WBNS TV Inc., and RadioOhio Incorporated (Petitioners in No. 79-827) in response to the briefs in opposition to the petitions for certiorari filed by WNCN Listeners Guild, *et al.* ("WNCN Respondents") and Office of Communication of the United Church of Christ, *et al.* ("UCC Respondents").

I.

The petitions for certiorari show that this case warrants plenary review because it presents major statutory and constitutional issues concerning the appropriateness of government regulation of broadcast licensee program choices. The oppositions implicitly concede that important statutory and constitutional issues are involved, but dispute that any new fundamental legal issues are presented.

The elaborate *en banc* opinion of the court of appeals, covering over 50 pages of discussion and analyses,¹ belies any suggestion that the questions involved are unimportant or limited in scope. Against the background of an extended and sharp disagreement over regulatory policy between the lower appellate court and the Commission, the decision below and the earlier program format cases in the District of Columbia Circuit represent the first judicial declaration that the "public interest" standard of the Communications Act requires the Commission to regulate changes in the entertainment and informational formats of individual radio station licensees. In short, this case falls directly in the line of cases in which this Court has exercised its authority to clarify questions concerning Commission regulation in the sensitive area of program content. See *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) ("*CBS v. DNC*"), *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) ("*Red Lion*") and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) ("*Midwest Video*"). The decision below also substitutes judicially formulated policy for administrative agency judgment in conflict with the mandate of this Court in *FCC v. Na-*

¹ *WNCN Listeners Guild v. FCC*, Nos. 76-1692, 76-1793, and 77-1951 (D.C. Cir. June 29, 1979). The opinion is reprinted in Appendix A of the Government's petition ("FCC App. A").

tional Citizens Committee for Broadcasting, 436 U.S. 775 (1978) ("*FCC v. NCCB*").

II.

In our petitions we demonstrated that the regulation of program format changes required by the court below finds no support in any provision of the Communications Act, the legislative history or any other authority. Respondents, however, portray the decision below as being narrowly drawn along traditional lines.² The simple syllogism they depict is founded on the Commission's statutory responsibility to pass upon broadcast applications under the general "public interest" standard contained in the basic licensing sections of the Communications Act.³

This analysis fails, however, because it assumes that embedded somewhere in the public interest standard is the specific requirement that the Commission review and regulate the selection of entertainment and informational programming formats. In fact, the decision of the court of appeals represents a radical departure from traditional standards. The court below identified no preexisting Commission policy supporting its decision. As the Commission observed in its Notice of Inquiry, "[f]or over 40 years . . . broadcast applicants have been free to select their own program formats."⁴ Respondents fail

² See, e.g., UCC Opp. 21-22; WNCN Opp. 4, 20-23.

³ 47 U.S.C. §§ 309(a), 309(e) and 310(d). The "clear statutory mandate" relied upon by WNCN Respondents (WNCN Opp. 26) is, in reality, nothing more than an implication they draw from these general statutory provisions which require the Commission to apply the public interest standard to certain broadcast applications and to hold an evidentiary hearing when such applications present material questions of fact.

⁴ *Notice of Inquiry: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580, 585 (1976).

to cite any case prior to the recent court of appeals decisions in which the Commission scrutinized specific entertainment formats in a licensing or transfer context. Nor do any other materials relied on by respondents reflect a Commission determination to engage in regulation of program formats.⁵ As we have shown in our peti-

⁵ In the *Report on Public Service Responsibility of Broadcast Licensees* (the "Blue Book"), cited by UCC Respondents (UCC Opp. 5-6, 8 n.7, 29), the Commission did not conclude that it should regulate the entertainment formats of its licensees. It merely decided to consider the quantity of a broadcaster's noncommercial, local-live, and public affairs programming in granting or denying licenses, and did not dictate the subject matter of the programming or require adherence to a particular format.

The UCC Respondents' suggestion (UCC Opp. 31) that the Commission in 1935 determined that it had the power to require licensees to adopt particular program formats is completely incorrect, and even their quotation of the Commission's 1935 Report is inaccurate. The quoted portion juxtaposes two sentences without indicating—by ellipses or otherwise—that intervening material was omitted. The omitted material, shown below in italics, demonstrates clearly that the Commission was directly opposed to requiring that broadcast stations be specialized either by the subject matter treated or by the segment of the audience served:

"The Commission feels that present legislation has the flexibility essential to attain the desired ends without necessitating at this time any changes in the law.

Among those appearing for the non-profit organizations were representatives of labor, education, religion and civic groups. The labor representatives did not favor a specific allocation of facilities but were interested mostly in the maintenance of the facilities that they now enjoy. Representatives of various educational institutions seemed to favor the present system while offering certain improvements which apparently can be accomplished under existing law. Most of the representatives of religious groups seem to favor the continuance of the present system. In general, representatives of non-profit groups expressed the opinion that the best results would be brought about by cooperation between the broadcasters and their organizations under the direction and supervision of the Commission, and not by an allocation of fixed percentages.

RECOMMENDATION:

THE FEDERAL COMMUNICATIONS COMMISSION RESPECTFULLY RECOMMENDS THAT AT THIS TIME NO FIXED PERCENTAGES OF RADIO BROADCAST FACILI-

tions,⁶ the Commission in the past has repeatedly declined to engage in such regulation.

Respondents also urge—whatever the preexisting practice—that the Commission must consider program diversity in judging renewals or assignments under the public interest standard. UCC Respondents suggest that "the Court of Appeals simply held that the Commission could not abdicate to the marketplace its statutory responsibility to make an affirmative public interest determination."⁷ In fact, even when the Commission has the power to adopt specific requirements under the public interest standard, it may appropriately make a determination not to regulate programming and instead to rely on the marketplace to achieve Commission goals. A determination to rely on the marketplace and individual licensee judgments in such circumstances hardly constitutes "abdication" of Commission responsibilities. Ironically, the WNCN Respondents suggest that the Commission's "total reliance on marketplace forces flies in the face of the language in [this Court's decision in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953)], which limits the agency to 'drawing on competition for complementary or auxilliary [sic] support'" ⁸ In fact, RCA merely

TIES BE ALLOCATED BY STATUTE TO PARTICULAR TYPES OR KINDS OF NON-PROFIT RADIO PROGRAMS OR TO PERSONS IDENTIFIED WITH PARTICULAR TYPES OR KINDS OF NON-PROFIT ACTIVITIES.

REASONS:

There is no need for a change in the existing law to accomplish the helpful purposes of the proposal."

Report of the Federal Communications Commission to Congress Pursuant to Section 307(c) of the Communications Act of 1934 at 4-5 (1935).

⁶ See ABC et al. Petition 15-16.

⁷ UCC Opp. 26-27.

⁸ WNCN Opp. 26.

held that, in licensing common carriers, the Commission may not assume that Congressional policy necessarily favors competition, but the Court also held that the Commission may rely on competition if it determines "that competition would serve some beneficial purpose such as maintaining good service and improving it."⁹

In broadcasting, the Commission not only has the discretion to rely on the marketplace to satisfy statutory objectives, in the area of programming the Act contemplates free competition and reliance on individual licensee judgments to the maximum possible extent. In *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), this Court held that

"Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his ability to make his programs attractive to the public."

See also *CBS v. DNC* and *Midwest Video*. Thus, competition among broadcasters through their program formats and individual licensee choice, not regulation, is precisely what Congress contemplated when it enacted the Communications Act, and is the same approach followed by the Commission up to the recent court of appeals decisions.¹⁰

⁹ 346 U.S. at 97.

¹⁰ See *ABC et al. Petition* 14-16; *NAB et al. Petition* 15 n.19. Contrary to UCC Respondents' suggestions (UCC Opp. 29) the Commission does not disagree with this view of the legislative history. Indeed, before the court of appeals the Commission relied on the same legislative history on which petitioners rely. Brief for Respondents Federal Communications Commission and United States of America in *WNCN Listeners Guild v. FCC*, Nos. 76-1692, 76-1793 and 77-1951 at 35-37 (D.C. Cir. June 29, 1979).

The suggestion of the WNCN Respondents (WNCN Opp. 26) that the Commission "concedes that the marketplace has failed" is nothing short of remarkable. While the Commission agreed that the marketplace is not infallible, it found that:

"[T]he marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (i.e., promoting the greatest diversity

The Commission's longstanding decision to refrain from regulating radio entertainment formats, based upon the censorial nature of that regulation, should be given great weight, particularly since, as this Court in *FCC v. NCCB* found, "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'" ¹¹

UCC Respondents suggest that Commission intrusion into programming is consistent with the Communications Act since it does not involve "public access" or Commission "editing" of particular program material.¹² However, this reflects an insupportably narrow reading of this Court's decisions in *CBS v. DNC* and *Midwest Video*. As this Court found in *CBS v. DNC*, "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations."¹³ Last term, in *Midwest Video*, this Court reaffirmed "the policy of the Act to preserve editorial control of programming in the licensee . . ."¹⁴ The decision of the court of appeals clearly denies licensees the freedom of choice which this Court has held to be basic to the statutory scheme.¹⁵

of listening choices for the public) or in economic terms (i.e., maximizing the welfare of consumers of radio programs)."

Changes in the Entertainment Formats of Broadcast Stations, 60 F.C.C.2d 858, 863 (1976) ("Policy Statement"), reconsideration denied, 66 F.C.C.2d 78 (1977).

¹¹ 436 U.S. at 796-97, quoting *Nat'l. Citizens Comm. for Broadcasting v. FCC*, 555 F.2d 938, 961 (D.C. Cir. 1978).

¹² UCC Opp. 37, 43. The assertion that "[u]nder the Court of Appeals decision, licensees are neither prohibited from broadcasting, nor required to broadcast, any particular programming or program format . . ." (WNCN Opp. 30) is indefensible. Absent Commission approval of a new format under the standards articulated by the court of appeals, a licensee would indeed be required to adhere to the old format.

¹³ 412 U.S. at 110.

¹⁴ 440 U.S. at 705.

¹⁵ It is perhaps noteworthy that the approach of the Commission in the decisions relied on by UCC Respondents (UCC Opp. 38 n.36,

In summary, while the WNCN Respondents claim that the decision below requires that the Commission merely "take a look" at format changes,¹⁶ and represents "a straightforward implementation of the regulatory scheme,"¹⁷ there is nothing limited, straightforward or traditional about a decision which directs the Commission to foresake a longstanding policy that successfully relied on individual licensee judgments and competitive marketplace conditions, and to begin direct and detailed review and regulation of the entertainment and informational programming of individual broadcast station licensees. In dramatically reversing this tradition, the court of appeals has blatantly substituted its own policy judgment, contrary to this Court's decision in *FCC v. NCCB*, and inaugurated an alternative approach that the Commission has repeatedly found to be contrary to the governing statute and overriding First Amendment interests.

The importance of the decision below is underscored by the fact that the court of appeals not only reiterates the court's format requirements in the context of assignments, it extends those requirements to renewals involving changes in informational or entertainment formats.¹⁸ Since every radio station must submit a renewal application every three years, these requirements must now be applied to all changes in broadcasting formats undertaken by radio licensees.¹⁹

para. 1) as evidence of permissible Commission program regulation was specifically disapproved by the Second Circuit as impermissibly involving the Commission in program choice. *Nat'l. Ass'n. of Independent Television Producers and Distrib. v. FCC*, 516 F.2d 525, 540-41 (2d Cir. 1975).

¹⁶ WNCN Opp. 4.

¹⁷ WNCN Opp. 24.

¹⁸ FCC App. A at 20a.

¹⁹ Respondents' repeated emphasis on the limited circumstances in which this policy will ultimately be applied (*e.g.*, UCC Opp. 26-27; WNCN Opp. 24) is not reassuring. Because the policy will now

Finally, this case threatens to undermine other important regulatory objectives. Indeed, at a time when the federal government in general and the Commission in particular are seeking ways to de-emphasize regulatory burdens,²⁰ this case conspicuously points in the opposite direction by calling for more expansive regulation—a consequence that is, in no small measure, aggravated by the sensitive nature of the program content regulation involved.

III.

The ultimate constitutional question of whether the First Amendment would be violated by the form of regulation mandated by the court of appeals is, manifestly, an independent issue of sufficient gravity and consequence to warrant review in this Court. The lower court's decision threatens to drastically alter a regulatory system which for almost half a century has entrusted broadcast stations with basic responsibility for selecting and presenting the entertainment and informational formats they deem most responsive to public needs and tastes. Our petitions have set forth at length the First Amendment implications of these changes for broadcast pro-

reach all renewal applications, its potential impact cannot be realistically measured by the number of assignment cases actually designated for hearing up to the present date. Moreover, such a measure fails to account for those situations in which broadcasters either decide not to innovate for fear of being locked into a "unique" format or decide not to change format for fear of becoming entangled in an expensive and protracted hearing, or the extensive and time consuming complaint and petition procedures that typically precede the hearing stage. Just as significantly, many cases are settled out of fear of the lengthy regulatory proceedings which the court of appeals requires.

²⁰ In a recent notice of inquiry the Commission has proposed to "deregulate" broadcast radio. See *Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636 (1979).

gramming and licensee decision-making.²¹ If this Court does not grant review to prevent these unconstitutional intrusions, the error of the court below will deeply permeate future Commission decision-making.

While respondents argue at length over the implications of *Red Lion*, *CBS v. DNC* and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) for this case, they completely fail to show that the First Amendment issues here are not important or that they do not warrant review by this Court.²² Moreover, respondents fail to even attempt rebuttal of petitioners' First Amendment arguments based on the facts of this case. As we have shown in our petitions, the court of appeals failed to give due deference to the Commission's judgment in this sensitive First Amendment area; the court of appeals mandate, if allowed to stand, will require the Commission to make delicate determinations that are by nature highly subjective; and the court of appeals decision will chill program format innovation and experimentation.

IV.

WNCN Respondents contend that review is unnecessary because it is unlikely in the future that there will be a conflict in the circuits, owing to the fact that Commission licensing decisions must be appealed to the District of Columbia Circuit under 47 U.S.C. § 402(b). WNCN Opp. 36. This, however, avoids the more compelling point; to wit, because of the very existence of Section 402(b), it is

²¹ ABC *et al.* Petition 18-24; NAB *et al.* Petition 20-24.

²² As decisions of this Court make clear, licensees are primarily charged with determining the needs and interests of their audiences and making programming judgments as trustees for the public. Under the policy formulated by the court of appeals, and unlike the programming responsibilities under the fairness doctrine approved in *Red Lion*, the licensee is not afforded the latitude to make its own program judgments and to select its own programming. "[The fairness doctrine] contemplates a wide range of licensee discretion." *Midwest Video*, 440 U.S. at 705 n.14.

unlikely that the questions presented in this case will arise in any other circuit. Accordingly, this factor heightens, rather than diminishes, the need for review.²³

CONCLUSION

For the reasons stated above and in the petitions for certiorari of the undersigned parties, the writs should be granted.

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²³ ABC *et al.* Petition 21-23; NAB *et al.* Petition 20-24. Both the WNCN Respondents and the UCC Respondents recognize that the court of appeals did not rest its decision on a procedural ground. UCC Opp. 20; WNCN Opp. 34. Nonetheless, the WNCN Respondents argue that review should be denied because of alleged procedural deficiencies in the record before the Commission. WNCN Opp. 21-25. Since they concede that the lower court specifically declined to reject the Commission's *Policy Statement* on this ground, and did not remand the matter to the agency for further proceedings, it is difficult to understand the relevancy of this factor in the context of whether this Court should review the basic statutory and constitutional issues presented. If review were denied by this Court, the Commission would be left with no alternative but to follow the instructions of the court of appeals. Denial of review would not result in a remand to the Commission to reconsider the matter, which is what would follow from a determination of procedural error. We note that the UCC Respondents do not urge that review be denied on this procedural ground.

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In the Supreme Court of the United States

OCTOBER TERM, 1979

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY MEMORANDUM FOR PETITIONERS

1. Respondents¹ fail to come to grips with our contention that nothing in the Communications Act of 1934 compels the Commission to review entertainment format changes on an ad hoc basis whenever listeners "grumble" about the loss of an allegedly unique format. The general "public interest" standard that the Commission applies when considering license transfers and renewals does not, on its face, require this kind of governmental intrusion, and respondents refer to no other statutory standard that does.

¹Respondents WNCN Listeners Guild, et al. and Office of Communication of the United Church of Christ, et al. are referred to hereinafter as "WNCN" and "UCC."

Although respondents protest that the Commission has "relegat[ed] the public interest determination to the marketplace" (WNCN Op. 26; UCC Op. 26), the Commission has determined that, in the case of entertainment programming, the public interest is best served by the free functioning of competition in all cases, rather than by government intervention in those instances when listeners allege that entertainment formats are "unique." This is not an abandonment of the obligation to determine what is in the public interest when licenses are renewed or transferred. To the contrary, the Commission has reasonably concluded that interjection of entertainment format controversies into licensing hearings will retard rather than advance the public interest objectives of the statute.²

Apparently recognizing that the court of appeals' "format doctrine" cannot rest on the plain meaning of the provisions of the Act, respondents quote from opinions of this Court that refer generally to the Commission's regulatory authority over radio communications. But none of those opinions considers entertainment format changes, or issues that are remotely related. To the extent that the cases relied on by respondents have any relevance here, they support the Commission's exercise of administrative discretion and demonstrate the errors in the analysis of the court of appeals. For example, *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-216 (1943), affirmed the Commission's discretion to adopt chain broadcasting regulations designed to enhance competition among broadcasters and

²Simply stated, the statutory goal of maximizing listener welfare would be undermined if the Commission were forced to sacrifice an essential public interest objective licensee programming discretion in pursuit of "ideal" diversity.

to minimize restraints of trade. The Court warned that judges should not assert their "personal views regarding the effective utilization of radio" in derogation of the agency's administrative responsibilities (319 U.S. at 218-219), and added that "[w]e certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission" (319 U.S. at 224)—precepts that the court of appeals ignored here.

Similarly, in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953), a case considering common carrier entry requirements, the Court recognized that a Commission determination resting on its expert "evaluation of the needs of the industry" would be entitled to judicial deference. Although the Court concluded that the Commission inadequately explicated the basis for its decision in that case, it stressed that the Commission's action would be upheld if the Commission found that "competition would serve some beneficial purpose such as maintaining good service or improving it" (346 U.S. at 97). In the present case, the Commission reached that very conclusion based on an extensive administrative record and a fully articulated analysis of the issues presented (Pet. App. 117a-196a).

2. Respondents also argue that the Commission's Policy Statement disagrees with its past interpretations and represents an "abrupt change" in policy (UCC Op. 9). That assertion is wholly inaccurate.³ Since its

³The 1928 and 1929 Reports of the Federal Radio Commission relied on by respondents (UCC Op. 6-7) are anachronisms from a period when there were few radio stations and large areas of the country received one radio signal at most. At that time, even the broadcast of phonograph records was thought by the Radio Commission to be a waste of scarce broadcast resources. See 2

formation, the Commission has never required renewal or transfer applicants to justify abandonment of allegedly unique entertainment formats—except in recent years when compelled to do so by the D.C. Circuit.⁴ The Commission has uniformly avoided value judgments on the content of entertainment programs. See, e.g., *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308-2309 (1960) (“the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment”).⁵

Federal Radio Commission *Annual Report* 168 (1928). Needless to say, conditions and public attitudes have changed dramatically since then. These early efforts at defining the public interest are hardly binding on the Federal Communications Commission today.

⁴We wish to emphasize that the Commission's Policy Statement does not govern *informational* programming (i.e., news and public affairs broadcasts) for listeners whose primary or only language is other than English. See Pet. App. 187a-188a. Different Commission rules require licensees to ascertain and meet the informational needs of substantial minority groups within their listening audiences. See, e.g., *Ascertainment of Community Problems*, 57 F.C.C. 418, 438-439 (1976); *Stone v. FCC*, 466 F. 2d 316, 327-329 (D.C. Cir. 1972). There is no basis for the assertion (UCC Op. 18 n. 16) that any particular entertainment format is essential for a station to be able to satisfy its informational programming obligations.

⁵As the Commission demonstrated in its brief in the court of appeals (pages 35-37), the legislative history of the Communications Act and its predecessor, the Radio Act of 1927, shows a general congressional intent to avoid requiring the Commission to establish public interest priorities for different format types. Contrary to the assertion of respondents (UCC Op. 29-31), the legislative history of Section 307(c) of the Act, 47 U.S.C. 307(c), and its administrative interpretation, demonstrate that neither Congress nor the Commission believed it to be in the public interest for the Commission to

3. Respondents also refuse to face the inevitable impact of the court of appeals' format doctrine on First Amendment values. Under the format doctrine, the Commission will be forced to render content-based value judgments about what type of entertainment programs should be broadcast.⁶ Respondents disingenuously suggest (UCC Op. 33; WNCN Op. 26-30) that the Commission need only hold a “hearing” and then consider a wide range of “remedies.” But there is no such easy escape: if the “hearing” establishes that the format in question is unique and financially viable, the “remedy” is perpetuation of the format. In past cases, the D.C. Circuit has been frank to acknowledge that it is “axiomatic” that the format’s “preservation * * * is generally in the public interest.” *Citizens Committee to Save WEFM v. FCC*, 506 F. 2d 246, 268 (D.C. Cir. 1974). Nothing in the opinion below disavows the court’s continuing commitment to that viewpoint. Moreover, as the Commission expressly found (Pet. App. 183a-184a), the prospect of governmental “hearings” to review

impose particular formats on unwilling radio stations including seemingly desirable formats such as non-profit or educational formats. See Report of the Federal Communications Commission to Congress Pursuant to Section 307(c) of the Communications Act of 1934 (1935).

⁶We fail to perceive the asserted disparity (UCC Op. 39-40) between our position and that of the private petitioners on the First Amendment issue in this case. Our constitutional objection to the court of appeals' format doctrine goes to the heart of the requirement that it imposes, not simply to the details of implementation (see Pet. 23-25). A proper interpretation of the Communications Act, with appropriate deference to First Amendment values, would avoid unnecessary conflicts between the Act and the Constitution.

proposed format changes whenever listeners "grumble" will chill format experimentation and deprive the public of the benefits of innovation, in contravention of statutory and First Amendment values.⁷

4. Although respondents argue (WNCN Op. 36) that the absence of a conflict among the circuits militates against review by this Court at this time, the exclusive jurisdiction of the D.C. Circuit over licensing controversies means that there will never be a conflict among the circuits or a future opportunity for the Commission to obtain review of the clash between its Policy Statement and the court of appeals' interpretation of the Act. In future format cases, the Commission will be required to implement and defend the court's format policy, not its own.⁸

⁷Contrary to the argument of respondents (WNCN Op. 35-36), the practical significance of the decision below cannot be measured by the limited number of format cases that have gone to hearing or have been litigated on appeal. The prospect of protracted and financially burdensome litigation commenced by listener groups—litigation invited by the court of appeals' decision—will inevitably chill the incentive to alter entertainment programming and lead broadcasters to settle controversies before protesting groups complain to the Commission.

⁸Even if there were merit to respondents' claim of procedural irregularity (WNCN Op. 31-35) which there is not (see Pet. 14 n.7)—that would not be a ground for denying review. The court of appeals considered and rejected the Commission's Policy Statement on its merits, not on procedural grounds (see Pet. 2 n.1). The court's decision prevents the Commission from repairing any alleged procedural defect, since it forecloses the adoption of the Policy Statement under any circumstances.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-824

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-825

INSILCO BROADCASTING CORPORATION, ET AL.,
PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-826

AMERICAN BROADCASTING COMPANIES, INC., ET AL.,
PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-827

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL COMMUNICATIONS
COMMISSION AND THE UNITED STATES OF AMERICA**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 610 F.2d 838. The Notice of Inquiry and Orders of the Federal Communications Commission (Pet. App. 60a-116a, 117a-175a, 176a-196a) are reported at 57 F.C.C.2d 580, 60 F.C.C.2d 858, and 66 F.C.C.2d 78.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a-59a) was entered on June 29, 1979. The petitions for a writ of certiorari were filed on November 26, 1979, within the period for filing as extended by the Chief Justice. The petitions were granted on March 3, 1980. This Court's jurisdiction rests on 28 U.S.C. 1254(1) and 2350(a).

QUESTION PRESENTED

Whether the Communications Act of 1934, read in light of the First Amendment, grants to the Federal Communications Commission the discretion to follow a policy of declining to review entertainment program format changes when a radio broadcast license is renewed or transferred.

STATUTES INVOLVED

The relevant portions of the Communications Act of 1934, 47 U.S.C. 151, *et seq.*, are set forth in the Appendix to this brief.

STATEMENT

1. In the early years of radio broadcasting, most radio stations provided diversified broadcast services, presenting a variety of program types or formats throughout the day. In more recent years, radio stations have begun to adopt special program formats, concentrating their broadcasts in areas such as classical music, country music, and all-day news coverage. This format specialization evolved in response to intense competition from television and the growth in the number of radio stations, which have increased from approximately 600 in 1935 to more than 8500 at present.

Since its inception, the Federal Communications Commission has permitted radio stations to select and modify entertainment programming as a matter of business discretion.¹ The United States Court of Appeals for the District of Columbia Circuit has disagreed with the Commission's approach. During the last decade, that court repeatedly has required the Commission to conduct hearings to scrutinize proposed changes in programming when those changes could

¹ See *Report of the Federal Communications Commission to Congress Pursuant to Section 307(c) of the Communications Act of 1934* 3 (1935); *Richmond Newspapers, Inc.*, 11 Rad. Reg. (P&F) 1234, 1270 n.13 (1955); *Eastern Oklahoma Television Co.*, 14 Rad. Reg. (P&F) 148, 149 (1956); *Bay Radio, Inc.*, 22 F.C.C. 1351, 1364 & n.16 (1957); *The Good Music Station*, 23 F.C.C. 611, 620-621 (1957); *Programming Policy Statement*, 44 F.C.C. 2303, 2308-2309 (1960); *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 679 (1971).

result in the elimination of a "unique" format. In *Citizens Committee (Atlanta) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970), the court of appeals set aside a radio station license assignment in view of the assignee's plans to change the station's format from "classical" to "popular" music. Referring to a survey indicating that 73% of the station's listeners preferred the proposed new format, while 16% preferred classical music, the court ruled that the Commission must hold a hearing and take appropriate administrative action to ensure that "all major aspects of contemporary culture [are] accommodated * * * whenever that is technically and economically feasible." 436 F.2d at 269. In imposing this requirement, the court relied not on any specific statutory directive but rather on its own interpretation of Section 310(b) of the Communications Act of 1934, 47 U.S.C. (1970 ed.) 310(b), which states that a radio station license may not be transferred "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 436 F.2d at 268.²

In *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973), the court again set aside a license assignment approved by the Commission. The station there involved planned to abandon an allegedly unique "progressive rock" format in favor of "middle of the road music." The court of appeals held, however, that if the abandoned format

was preferred by some "significant minority" of the public, "it is in the public's best interest to have all segments [of contemporary culture] represented." *Id.* at 929. The court held that a hearing was required on factual issues arising from a proposed format change when "public grumbling reaches significant proportions * * *." *Id.* at 934.

In *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974), the court of appeals, sitting en banc, set aside yet another order of the Commission approving a license assignment that would have resulted in the replacement of a "classical" music format with "contemporary" programming. The court summarized its "format doctrine" as follows:

When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest. Finally, it is not sufficient justification for approving the application that the assignor has asserted financial losses in providing the special format; those losses must be attributable to the

² Section 310(b) was redesignated Section 310(d) in 1974. See 88 Stat. 1576.

format itself in order logically to support an assignment that occasions a loss of the format.

Id. at 262. The court added that it is "axiomatic" that a unique format's "preservation * * * is generally in the public interest." *Id.* at 268. The court based its decision on the general "public interest" standard of Sections 309(a) and 310(b) of the Communications Act of 1934, 47 U.S.C. 309(a) and (1970 ed.) 310(b), and the Commission's authority under Section 303(g) of the Act, 47 U.S.C. 303(g), to "encourage the larger and more effective use of radio * * *." The court did not address the constitutional implications of government regulation of entertainment format selections.

2. Because the court of appeals' format doctrine had developed on an *ad hoc* basis in individual license assignment proceedings, the overriding question of the government's appropriate role in the selection and modification of entertainment formats had never been explored systematically by the Commission. Accordingly, the Commission instituted an inquiry to receive public comment and to provide a record on the factual and policy issues presented. In its January 1976 Notice of Inquiry (Pet. App. 60a), the Commission raised the question whether the government could serve as a better judge than the competitive marketplace in determining what entertainment programming best serves the public interest. The Commission expressed concern that the court of appeals' format doctrine might frustrate rather than stimulate flexible competitive responses to changes in audience listening preferences, might discourage experi-

mentation with unique program formats, and might encourage conformity rather than diversity in programming (Pet. App. 68a-69a). The Commission sought comments on how the format doctrine could be implemented to minimize these difficulties and to protect the First Amendment rights of broadcasters and listeners.³

Following public notice and comment, the Commission issued a Memorandum Opinion and Order (Pet. App. 117a-135a), which concluded that the court of appeals' format doctrine was inconsistent with the express terms and policies of the Communications Act of 1934, presented intractable problems of administration, and could not provide any significant increase in program diversity over that provided by competi-

³ When the Notice of Inquiry was issued, Commissioner Robinson summarized his view of the "vexing problems" created by the court of appeals' format doctrine (Pet. App. 93a-94a):

The standard for "uniqueness" or "diversity"—the diversity that the public wants enough so as to cause it to grumble when it is diminished—is obviously idiosyncratic and subjective. Quite aside from the constitutional objections * * * this subjective element presents intractable difficulties in administration. What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions * * *. [B]y the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved. At that thought the mind swims and the heart sinks.

tive forces in the marketplace. In reaching that conclusion, the Commission reiterated the principles expressed by this Court in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940), which emphasized that "the field of broadcasting is one of free competition" and that Congress intended to allow "broadcasters to survive or succumb according to [their] ability to make [their] programs attractive to the public." The Commission added that if "broadcasters are to compete with one another, * * * they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take" (Pet. App. 123a).

The Commission also concluded that competition among broadcasters provides substantial diversity in entertainment programming (Pet. App. 128a). Competitive forces, in the Commission's view, are superior to government regulation in producing programming that satisfies the needs and interests of the listening public. The market provides "a precious element of flexibility which no system of regulatory supervision could possibly approximate" (Pet. App. 131a).⁴

⁴ The Commission's conclusions rested in part on a staff analysis (Pet. App. 156a-170a), which found that even formats that are generically similar are not regarded by the public as close substitutes for one another. The staff analysis concluded that, "given the difficulties in defining a meaningful format classification coupled with a total lack of information on the relative values associated with different types of programs," any attempt by the Commission to screen format changes would produce irrational results (Pet. App.

The Commission also noted that the court of appeals' format doctrine would apply to all broadcast applications under Title III of the Communications Act of 1934, 47 U.S.C. 301 *et seq.*, including assignment applications and nearly 3000 annual license renewal applications (Pet. App. 124a-125a). This increased the Commission's practical dilemma in attempting to determine what a station's existing format is, whether there are reasonable substitutes for that format in the market, and, if not, whether the benefits accruing to the public from a format change outweigh the disadvantages of abandoning a prior format (Pet. App. 125a). The Commission expressed serious doubt about its competence to determine whether a radio station's entertainment format is "unique" and whether there are "reasonable substitutes" available (*id.* at 125a-128a).⁵ The Commission added that "[t]here is no way to determine

163a-164a). The staff analysis added that Commission regulation of formats would result in less "efficient allocation of entertainment formats than would be obtained if programming decisions were left in the hands of broadcast licensees, who are, after all, far more familiar with listeners' tastes" (Pet. App. 164a). See also J.A. 35-37.

⁵ The Commission pointed out that the court of appeals previously had held that this problem could not be avoided by defining formats broadly. The court has required the Commission to "distinguish progressive rock music from the other species of the rock genre, *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973) * * * [and] to distinguish between 19th Century and 20th Century classical music. [*WEFM*] 506 F.2d at 264 n.28 * * *." (Pet. App. 126a).

the relative values of two different types of programming in the abstract. This is a practical empirical question, whose answer turns on the *intensity* of demand for each format" (Pet. App. 130a). The agency's experience and the record in this proceeding showed that there is no reliable method for measuring the intensity of listener preference, and, as a consequence, no basis for concluding that government screening of format changes would better serve the public interest than unrestrained competition (Pet. App. 130a, 156a-164a; J.A. 36-39, 73-76).

The Commission also concluded that government regulation of entertainment formats unnecessarily infringed the First Amendment rights of both radio listeners and broadcasters. The Commission explained that the threat of administrative hearings, prompted by complaints from listeners who object to a proposed format change, would make the risk of "undertaking innovative or novel programming altogether unacceptable." The Commission added that the prospect of a government-imposed obligation "to continue [allegedly unique] service * * * inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications * * *" (Pet. App. 132a-133a). The Commission also pointed out that enforcement of the court of appeals' format doctrine would abridge the traditional freedom of radio station licensees, replacing managerial discretion with a "comprehensive,

discriminating, and continuing state surveillance * * *" (Pet. App. 134a).

3. On petition for review, the court of appeals, sitting en banc, set aside the Commission's Memorandum Opinion and Order, holding that it was "unavailing and of no force and effect" (Pet. App. 40a). The court reaffirmed the basic policy of its format doctrine—that "all major aspects of contemporary culture" should be accommodated by radio broadcasters whenever that is technologically and economically feasible (Pet. App. 5a). Under that doctrine, the Commission must determine whether the public interest permits a renewal or assignment applicant to change its entertainment format (Pet. App. 5a). According to the court, the Commission may approve the application without a hearing only if undisputed facts show that (Pet. App. 24a-25a):

(1) there is an adequate substitute in the service area for the format being abandoned, (2) there is no substantial support for the endangered format as evidenced by an outcry of public protest, (3) the devotees of the endangered format are too few to be served by the available frequencies, or (4) the format is not financially viable.

In reaffirming its prior format holdings, the court avoided any substantial consideration of the legislative history of the Communications Act of 1934, and likewise dismissed the Commission's First Amendment contentions with the statement that it found "no constitutional impediment" to the format doctrine

(Pet. App. 33a). The court also rejected the Commission's factual determination that it could not do a better job than the marketplace in producing diverse entertainment formats desired by the listening public. The court found more convincing its own "common sense" understanding of the radio marketplace (Pet. App. 37a):

The common sense of it is that most lovers of disco will switch to another disco station in preference to classical, all-news, country and western or the like. When a unique format is abandoned, those loyal to that format will have no adequate substitute in the service area; when a non-unique format is eliminated, its listeners will generally have an adequate substitute in other stations programing the same format.

In a concurring opinion, Judge Bazelon concluded that the Commission's order should be vacated on procedural grounds.* Nonetheless, he expressed his disagreement with the majority's "unwillingness to give appropriate deference to the Commission's judgment," and noted that the majority has "virtually confine[d] the FCC to a spectator's role in formulating policies that will promote and preserve diversity while minimizing the hazards of government intrusion into the content of broadcasting" (Pet. App. 41a-42a). Judge Bazelon added that "the Commis-

* Judge Bazelon was of the view that respondents improperly had been denied the opportunity to comment on a staff analysis paper prior to its consideration by the Commission (Pet. App. 41a). The majority opinion did not rest on this ground (Pet. App. 17a n.24).

sion's accommodation of the conflicting policy interests is neither irrational nor wholly contrary to the purposes of the Communications Act" (Pet. App. 42a). For this reason, he would not reject the Commission's decision "to cast its lot with the marketplace" (*id.* at 43a), particularly in view of the "'sensitive First Amendment implications' of government oversight of format choice" (*id.* at 42a). Judge Bazelon added that the majority had "fail[ed] to grapple seriously with the constitutional implications of its decision" (*ibid.*).

Judges Tamm and MacKinnon dissented, concluding that the majority opinion "usurps the proper role of the [Commission] in the formulation of communications policy" (*id.* at 46a). In addition, the dissent criticized the majority's "lack of deference [to] the Commission's assessment of market conditions" (*id.* at 55a), noting that the majority had (*ibid.*):

mount[ed] untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's.

The dissenting judges also concluded that the majority had failed to respond to the Commission's demonstration that it could not do a better job than

the marketplace in producing diverse entertainment programming desired by the public at large (*id.* at 53a-54a):

The majority has not explained how to decide whether a specific format is unique, how to measure the number of listeners who favor a changed format, or how to compare the intensity of preference between listeners who desire retention of a unique format and those who prefer a variation of a preexisting format. Finally, the majority has failed to identify the principle within the Communications Act that mandates regulation favoring the interests of fewer listeners over the interests of more listeners.

SUMMARY OF ARGUMENT

I.

The court of appeals' format doctrine requires the Commission to scrutinize changes in "unique" entertainment programming and to determine if those changes are permissible when a broadcaster seeks to renew or assign its station license. This requirement is said to be based on the need to achieve optimal "diversity" in entertainment programming. Although disavowing any intention to prescribe communications policy in derogation of the Commission's administrative responsibilities, the court of appeals failed to identify any provision in the Communications Act of 1934 which requires the Commission to regulate entertainment format changes in this manner.

Sections 309(a) and 310(d) of the Act, 47 U.S.C. 309(a) and 310(d), require the Commission, when

passing on applications to transfer or renew a station license, to determine whether granting such applications would be consistent with the "public interest." But Congress did not prescribe that, in discharging this responsibility, the Commission must review the entertainment formats of broadcasters and adjudicate the propriety of their program changes. Because the literal terms of the Act do not compel the Commission to regulate the selection and modification of entertainment formats, the Commission acted within its discretion in determining that diversity in entertainment programming should continue to be pursued, as it has traditionally, through free competition among broadcasters.

Far from requiring the Commission to regulate the content of entertainment programming, the provisions of the Communications Act confirm that such regulation is an inappropriate function. In Sections 3(h) and 326 of the Act, 47 U.S.C. 153(h) and 326, Congress has provided that broadcasters may not be treated as common carriers and has enjoined the Commission not to "interfere with the right of free speech by means of radio communication." These provisions establish that "Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations." *CBS v. Democratic National Committee*, 412 U.S. 94, 110 (1973). Significantly, the legislative history of the Communications Act of 1934, and its predecessor, the Radio Act of 1927, clearly shows that Congress intentionally declined to require the

Commission to prescribe or prohibit the broadcasting of particular genres of programming. In light of the explicit terms and purposes of the Act, the court of appeals should not have superimposed a form of regulation that stifles the very freedoms that Congress sought to preserve.

II.

Based on a careful examination of the record before it and an application of its administrative expertise, the Commission determined that regulation of programming to preserve "unique" entertainment formats is not feasible. The Commission found that the acute practical problems inherent in format regulation make any possible benefit that could flow from such regulation entirely speculative. Because entertainment programming is a rich composite of elements, it is extremely difficult to classify such programming into "formats" and to determine whether such programming is "unique" or has "reasonable substitutes." As the Commission explained, the elements in radio programs which appeal to listeners "are too fleeting to be caught in the clumsy nets of legal formulations" (Pet. App. 100a). Furthermore, the intensity of listener interest in radio programming cannot be ascertained. For that reason, the Commission cannot rationally determine in any particular case whether the public interest would better be served by adoption of one program format rather than another. Abandonment of a "unique" format and adoption of a "duplicative" format in its place may, in fact, *increase* listener welfare. Finally, the

Commission is not equipped to make the determination, required by the court of appeals, whether a format sought to be abandoned by a broadcaster "might have been" financially viable under efficient station management. As the Commission explained, this is an "almost fantastically speculative point for inquiry" (Pet. App. 127a n.5).

Having reviewed the serious practical obstacles to format regulation, the Commission considered the merits of continued reliance on competition to achieve program diversity desired by radio listeners. The Commission's decision in favor of competition is a classic example of an informed judgment by an agency regarding what is needed to serve the "public interest." The Commission found that, under competitive conditions, program diversity is substantial and that competition permits broadcasters to respond to changes in listener preference with speed and flexibility. In contrast, format regulation, as mandated by the court of appeals, deters innovation in new programming. As the Commission explained: "[u]nder the threat of a hearing that could cost tens or hundreds of thousands of dollars, many licensees might consider the risks of undertaking innovative or novel programming altogether unacceptable" (Pet. App. 132a-133a). Thus, the court of appeals' format doctrine is counterproductive, actually discouraging unique programming directed to specialized audiences and reducing diversity in the marketplace.

Although, in the absence of government compulsion to preserve format types, a particular "unique"

format may temporarily disappear, free competition permits broadcasters to offer variations *within* format types. When public demand for programming of a particular kind is intense, a station abandoning a unique format can respond to that demand by offering diversified entertainment within the format that is most desired by listeners.

III.

The Commission's consistent interpretation of its statute, which affords broadcasters discretion to adopt and modify entertainment programming, is strongly supported by First Amendment principles. Although broadcasters' freedom of speech is not absolute, serious First Amendment questions would be raised if the Commission were to require a radio station to continue to broadcast an unwanted entertainment format or to revert to a previously abandoned entertainment format. Yet that is what the court of appeals, in effect, has directed the Commission to require. In the view of the court of appeals, if retention of an existing format is in the "public interest," the Commission must generally deny a renewal or assignment application that proposes to change the format. Such a denial would unquestionably restrain the broadcasting of new programming.

In addition to the compulsion that would result if the Commission were to withhold permission to assign or renew a station license based on the program content of the applicant, the format doctrine has a potent

chilling effect. The very existence of a governmental policy of regulating formats chills a broadcaster's willingness to abandon an existing format and inhibits the adoption of new formats. A broadcaster seeking to abandon an allegedly "unique" format faces protracted Commission proceedings if there is substantial "public grumbling." And a broadcaster seeking to adopt a new format that might later be characterized as "unique" runs the risk that the government will compel him to retain it indefinitely. The format doctrine thus serves to "lock" broadcasters into existing programming and diminishes freedom of expression.

Because substantial First Amendment values are threatened by the court of appeals' format doctrine, that doctrine should not be approved unless it is the least intrusive means to achieve the public interest goal. Here, the Commission reasonably determined that the goal of diversity in programming could be achieved through free competition. The Commission was well within its discretion in casting its lot with the marketplace and avoiding unnecessary restraints on expression. See *CBS v. Democratic National Committee*, 412 U.S. 94, 127 (1973). Since the Commission's interpretation is strongly supported by both the provisions of the Communications Act and the terms of the First Amendment, the court of appeals should have upheld the Commission's opinion and order.

ARGUMENT

I. THE COMMUNICATIONS ACT OF 1934 DOES NOT REQUIRE THE COMMISSION TO REGULATE RADIO STATION ENTERTAINMENT FORMATS

The court of appeals asserted that its "format doctrine" was not the product of judicial policy-making, but rather was the result of conventional statutory interpretation (Pet. App. 32a-33a). However, the court failed to identify any provision in the Communications Act of 1934 that compels the Commission to regulate purportedly "unique" entertainment formats. In addition, the court essentially ignored those provisions of the Act which enjoin the Commission from interfering with the freedom of speech of radio broadcasters and from imposing common carrier requirements on those broadcasters. Similarly, the court of appeals failed to consider the legislative history of the Communications Act of 1934 and its predecessor, the Radio Act of 1927, which reflects a deliberate congressional decision not to invest the Commission with the duty to regulate entertainment formats.

A. The text of the Communications Act, and this Court's decisions construing it, show that the Commission is not required to regulate entertainment formats

1. Although the court of appeals maintained that its format doctrine expressed the "law of the land as enacted by Congress" (Pet. App. 32a), the court cited no statutory provision that obligates the Com-

mission to oversee the selection and modification of entertainment formats. Instead, the court relied on its earlier "format doctrine" decisions. But those decisions are likewise lacking in any substantial statutory analysis.⁷

The court of appeals' first format decision, *Citizens Committee (Atlanta) v. FCC*, 436 F.2d 263, 268-269 (D.C. Cir. 1970), concluded that the Commission must determine in a license assignment hearing whether abandonment of a "unique" entertainment format is permissible. That requirement was said to derive from Sections 309(a) and 310(d) (former Section 310(b)) of the Communications Act of 1934, 47 U.S.C. 309(a) and 310(d), which provide that license assignments may be approved by the Commission if consistent with the "public interest, convenience, and necessity." But these general terms do not, on their face, require the Commission to review format modifications when considering applications to assign a station license. They do not stand in the way of the Commission's reasoned determination that the public interest, convenience, and necessity are, in fact, best

⁷ See Polsby, *FCC v. National Citizens Committee for Broadcasting and the Judicious Uses of Administrative Discretion*, 1978 Sup. Ct. Rev. 1, 17: "The [format] cases are extraordinary illustrations of a court willing to expand its own function at the expense of the agency's discretion, to make remote inferences of policy from amorphous and general statutory language, and to go beyond mere oversight of the agency's work product to an extended collaborative dialogue with the Commission over what its substantive policies ought to be."

served by avoidance of government interference with the programming discretion of radio broadcasters.*

In *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 267 (D.C. Cir. 1974), the court of appeals extracted several statements from this Court's opinion in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), to buttress its format doctrine. One such sentence merely reminded that "[t]he public interest to be served under the Communications Act is * * * the interest of the listening public 'in the larger and more effective use of radio.' § 303(g)." But nothing in that sentence or the hortatory language of Section 303(g) of the Act, 47 U.S.C. 303(g), suggests that the "larger and more effective use of radio" must be achieved through Commission regulation of entertainment formats.⁹ The general discussion of statutory goals in *National Broadcasting* does not purport to limit the means the Commis-

* The court of appeals offered no additional statutory analysis in its next two decisions applying the "format doctrine." See *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973).

⁹ Section 303(g), 47 U.S.C. 303(g), provides that the Commission shall "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." In considering that provision, the court of appeals also should have considered this Court's admonition in *National Broadcasting* that judges should not assert their "personal views regarding the effective utilization of radio" in derogation of the Commission's administrative responsibilities. 319 U.S. at 218-219, 224.

sion may employ to further those goals, and offers no justification for the court of appeals' rejection of the Commission's reasoned view that competition, rather than additional regulation, is best adapted to serve "the interest of the listening public."¹⁰

Because the literal terms of the Communications Act do not require the Commission to regulate the selection and modification of entertainment formats, the Commission acted within its discretion in determining that the goal of program diversity should continue¹¹ to be pursued, as it has traditionally, through free competition. As this Court repeatedly has determined, free competition is one of the "public interest" values embodied in the Communications Act. See, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940) ("the field of broadcasting is one of free competition. * * * Congress

¹⁰ The court in *WEFM* also sought to justify its holding by reference to *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953). But that case, dealing with common carrier entry requirements, has little relevance here. See Pet. App. 122a-123a. To the extent that it is relevant, *RCA Communications* supports the Commission's position. *RCA Communications* recognized that a Commission determination resting on the agency's expert "evaluation of the needs of the industry" would be entitled to deference, and that a Commission decision favoring reliance on competition would be upheld if the Commission determined that "competition would serve some beneficial purpose such as maintaining good service and improving it" (346 U.S. at 97). In the present case, the Commission reached that very conclusion based on an extensive administrative record and a fully articulated analysis of the public benefits to be secured through competition (Pet. App. 117a-195a).

intended to leave competition in the business of broadcasting where it found it, to permit a licensee * * * to survive or succumb according to his ability to make his programs attractive to the public"); *CBS v. Democratic National Committee*, 412 U.S. 94, 110 (1973) ("Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations"); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) (emphasizing the importance of preserving "the journalistic freedom of persons engaged in broadcasting").¹¹

2. Far from mandating government supervision of the selection or modification of entertainment formats, the literal terms of the Communications Act of 1934 strongly support the Commission's view that such supervision is inappropriate. As the Commission explained in its opinion below (Pet. App. 119a-123a), the scheme of regulation required by the court of appeals clashes with Section 3(h) of the Act, 47 U.S.C. 153(h), which provides that a radio broad-

¹¹ The court of appeals also reasoned that, because the Communications Act does not compel broadcasters to pay a fee for access to the public airwaves, the Act, by necessary implication, requires Commission intervention in format selections to maximize broadcaster responsiveness to the tastes of the listeners who own the airwaves (Pet. App. 38a-40a). But it hardly follows from the absence of a spectrum fee that Congress believed Commission intrusion to be necessary or desirable. Nothing in the text of the statute compels the court's interpretation of congressional intent. Moreover, the court's interpretation conflicts with this Court's view that Congress intended to preserve the values of free competition and journalistic discretion.

caster may not "be deemed a common carrier." Section 3(h) prescribes a substantive limitation on the Commission's regulatory authority. See *FCC v. Midwest Video Corp.*, *supra*, 440 U.S. at 700-709; *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 105-109. Enforcement of the court of appeals' format doctrine would result in an imposition upon radio broadcasters of obligations analogous to those of common carriers. Common carriers generally may not abandon a unique service offered to the public without prior regulatory approval. See, *e.g.*, 47 U.S.C. 214(a). A Commission requirement that a broadcaster perpetuate a particular entertainment format as a condition to renewing or transferring its license would impose similar restraints on radio broadcasters.¹² As the Commission explained (Pet. App. 122a-123a):

In contradistinction to the 'obligation, deeply embedded in law, to continue service,' which common carriers must bear, the Communications Act 'recognizes that broadcasters are not common carriers and are not to be dealt with as

¹² The court of appeals disregarded economic reality when it asserted that its format doctrine bears no resemblance to common carrier regulation because it does not "obligate[] broadcasters to 'continue in service' * * *" (Pet. App. 26a n.36). It is true, of course, that broadcasters may elect to give up their license rather than continue broadcasting an unwanted entertainment format. However, a broadcaster faced with the choice of continuing an unwanted but economically viable format or surrendering his license is subject to substantial compulsion to perpetuate existing programming.

such.' * * * [B]roadcasters are to compete with one another, and they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take. It was through this regime of competition that Congress 'aim[ed] * * * to secure the maximum benefits of radio to all the people of the United States,' * * *.¹²

A Commission decision to condition renewal or transfer of a radio station license on the station's agreement to continue to broadcast an unwanted entertainment format and to abandon a desired new format would also conflict with Section 326 of the Communications Act of 1934, 47 U.S.C. 326. That provision withholds the "power of censorship" from the Commission and states that "no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."¹⁴ As this Court

¹² The court of appeals' requirement that unwanted but "financially viable" program formats be retained would also impose on the Commission a duty to determine whether the broadcaster is obtaining a "reasonable rate of return" from the existing program format. That is essentially the same determination that the Commission must make in reviewing the rates of return of common carriers. See 47 U.S.C. 201, 203, 204. See also pages 44-45, *infra*.

¹⁴ This provision directly supports the Commission's conclusion that Congress intended the "public interest" standard of the Communications Act to be interpreted with the greatest respect for First Amendment values. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-501 (1979). The First Amendment implications of the court of appeals' format doctrine are discussed on pages 51-57, *infra*.

repeatedly has held, Section 326 reflects a clear "legislative desire to preserve the values of private journalism." *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 109-110; *FCC v. Midwest Video Corp.*, *supra*, 440 U.S. at 704. Section 326 does not, of course, prevent the Commission from reviewing broadcasts to determine if they conflict with specific statutory requirements. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 738 (1979) (upholding the Commission's power to review "obscene, indecent, and profane" broadcasts). It does, however, reinforce the view that the Commission exceeds its intended role by foreclosing new programming simply because that programming does not contribute to ideal "diversity" or engenders "grumbling" from certain segments of the listening public. See *FCC v. Sanders Bros. Radio Station*, *supra*, 309 U.S. at 475 (Congress did not give the Commission general "supervisory control of the programs" of radio broadcasters).

B. The legislative history of the Communications Act of 1934, supplemented by the Commission's consistent administrative interpretation, confirms that the Commission is not required to regulate entertainment formats

1. The legislative history of the Communications Act of 1934, and its predecessor, the Radio Act of 1927, ch. 169, 44 Stat. 1162, clearly demonstrates that Congress did not intend the Commission to establish public interest priorities for different types of radio

programming.¹⁵ Prior to the enactment of the Radio Act of 1927, Congress gave serious consideration to requiring a federal administrative agency to prescribe "the priorities as to subject matter [program content] to be observed by each class of licensed station." See H.R. 7357, 68th Cong., 1st Sess. § 1(B) (b) and (c) (1924). It was suggested that the government should regulate musical program formats because broadcasters had not given preference to "high class music" and "sacred music" over "jazz." Proponents of such regulation believed that there ought to be "some provision to afford a better and more wholesome set of programs than sometimes exist." See *Radio Communications: Hearings on H.R. 5589 Before the House Comm. on Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37-39 (1926).

When the Radio Act of 1927 was introduced in the House of Representatives, however, the provision authorizing government prescription of radio program content was deleted. See H.R. 5589, 69th Cong., 1st Sess. (1926). The author of the bill, Congressman Wallace White, explained that he deleted the provision "because of the fear which had been expressed by so many to me that that did confer something

¹⁵ The legislative history of the Communications Act of 1934 and the Radio Act of 1927 is reviewed in detail in the decisions of this Court. See *FCC v. Sanders Bros. Radio Station*, *supra*, 309 U.S. at 474; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940); *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 103-110; *FCC v. Pacifica Foundation*, *supra*, 438 U.S. at 735-738.

akin to censorship." Hearings on H.R. 5589, *supra*, at 39-40. The Senate went further than the House, adopting a specific provision in the bill that barred censorship by the Federal Radio Commission. See *Radio Control: Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926). The final version of the bill that passed both houses of Congress omitted any provision authorizing the Federal Radio Commission to prescribe program content and specifically prohibited program censorship. See H.R. Conf. Rep. No. 1886, 69th Cong., 2d Sess. 16-19 (1927).¹⁶

When Congress enacted the Communications Act of 1934, it retained the provision forbidding government censorship and guaranteeing freedom of speech (Section 326 of the Act, 47 U.S.C. 326). And it again rejected suggestions that the licensing authority (the Federal Communications Commission) should exercise supervisory power over program content. Thus, a proposal that would have required the Commission to allocate 25 percent of radio broadcasts to educational, religious, agricultural and similar programming was defeated. See 78 Cong. Rec. 8843-8846 (1934). During hearings on that proposal, Congressman White explained:

¹⁶ Section 29 of the Radio Act of 1927, ch. 169, 44 Stat. 1172-1173, the predecessor of Section 326 of the Communications Act of 1934, 47 U.S.C. 326, forbade government "censorship over radio communications" and also prescribed that the government may not "interfere with the right of free speech by means of radio communication."

At one time, in an earlier draft which I had presented to the House, I did have a direction that the regulatory body should establish priorities as to character of service, but even that was so controversial that it was eliminated from the final draft, and there was a very clear purpose to give no prior rights or preferential recognition to any group or any service.

Federal Communications Commission: Hearings on S. 2910 Before the Senate Comm. on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 191 (1934); see also 78 Cong. Rec. 8843-8845 (1934). Rather than requiring radio broadcasters to provide specified kinds of programming, Congress underscored its intent to safeguard broadcaster discretion by enacting Section 3(h) of the Act, 47 U.S.C. 153(h), which provides that "a person engaged in radio broadcasting shall not * * * be deemed a common carrier."

The legislative history of the Communications Act of 1934 and its predecessor statute thus reiterates a continuing theme: Congress wished to preserve the broadest freedom of speech for broadcasters consistent with the public interest, and repeatedly rejected proposals that would empower administrative agencies to prescribe or interfere with the selection of program content.¹⁷

¹⁷ As we have previously noted, the freedom of speech of broadcasters is not absolute. *FCC v. Pacifica Foundation*, *supra*. As this Court cautioned in *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 110, however, "only when the interests of the public are found to outweigh the private journalistic interests of the broadcasters will government power be asserted within the framework of the Act." In the

2. In construing its own organic statute, the Commission has given effect to the congressional intent by declining to interfere with the discretion of broadcasters in selecting and modifying entertainment formats. In its Memorandum Opinion and Order below, the Commission emphasized that "[f]or over 40 years * * * broadcast applicants have been free to select their own programming formats" (Pet. App. 72a). See also *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308-2309 (1960): "the Commission in administering the Act * * * [has] consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment. * * * The Commission's role as a practical matter, let alone a legal matter, cannot be one of program dictation or program supervision." See also the authorities cited in note 1, *supra*.

The Commission's consistent interpretation over a forty year period is entitled to deference pursuant to the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *." *Red Lion Broadcasting Co. v.*

present case, the Commission found, after a comprehensive hearing and a careful examination of the issues presented, that the "interests of the public" would be impaired rather than advanced by abridgement of the freedom of expression of broadcasters as required by the court of appeals' "format doctrine." See pages 33-51, *infra*.

FCC, 395 U.S. 367, 381 (1969); *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 121. This precept applies with particular force under a statute such as the Communications Act which has been amended many times. "Thirty years of consistent administrative construction left undisturbed by Congress" is a compelling indication that the agency has correctly discerned the legislative intent. *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 382. See also *Andrus v. Allard*, No. 78-740 (Nov. 27, 1979), slip op. 6; *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).¹⁸ In light of the agreement between the Commission's interpretation and the text and history of the Communications Act, this Court's admonition in *Ford Motor Credit Co. v. Milhollin*, No. 78-1487 (Feb. 20, 1980), slip op. 12, applies with particular force in the present circumstances—"a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views."

As we demonstrate below, the deference traditionally afforded to administrative interpretations is especially appropriate here, since the "format doctrine" fashioned by the court of appeals exceeds the

¹⁸ Congress has continued to reject proposals to amend the Communications Act in such a way that the Commission would be required to prescribe program content or establish program priorities. See 106 Cong. Rec. 17638-17639 (1960). See also *id.* at 17638 (remarks of Sen. Pastore) (the Commission should not be required to give preference to "symphonic music" over "boogie-woogie" music).

bounds of conventional statutory interpretation and intrudes into the domain of administrative policy-making.

II. THE COURT OF APPEALS SUBSTITUTED ITS POLICY VIEWS FOR THOSE OF THE COMMISSION

The decisions of this Court clearly delineate the respective roles of administrative agencies and reviewing courts. Agencies are charged with the duty to assess relevant factual and policy considerations and to "weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'"¹⁹ An agency may render its judgment based on predictions and accumulated experience in the industry. A "forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency." *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978).

By contrast, the function of the reviewing court is limited. That function is exhausted once it is determined that the agency's decision is rationally based on relevant factors. *Citizens to Preserve Over-*

¹⁹ See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). Put another way, the agency's function is "not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies." *United States v. Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945).

ton Park v. Volpe, 401 U.S. 402, 416 (1971). That a court "might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion * * *" (*FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946)), particularly when the agency's decision is based on its analysis of public policy, which is "entitled to the greatest amount of weight by appellate courts" (*SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947)).

The Communications Act of 1934 requires the Commission to exercise its administrative authority in the "public interest, convenience and necessity." 47 U.S.C. 301, 303, 309(a), 310(d). That mandate is a "supple instrument for the exercise of discretion by the expert body * * *." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). The Commission's "public interest" determinations under these statutory provisions are entitled to substantial judicial deference. *National Broadcasting Co. v. United States*, *supra*, 319 U.S. at 224. In particular, the proper accommodation of "diversity" and other values inherent in the "public interest" standard presents a delicate question committed to the expert judgment of the Commission. See *FCC v. National Citizens Comm. for Broadcasting*, *supra*, 436 U.S. at 803-814.

Based on a full administrative record, the Commission reasonably found that the best method to achieve "diversity" in entertainment formats and to promote the public interest is to leave the selection and modification of entertainment formats—includ-

ing "unique" formats—to the discretion of broadcasters. While competition for listeners may not perfectly match programming with listener desires at a given point in time, the Commission reasonably determined that consistent reliance on the marketplace is a preferable alternative to periodic governmental intervention aimed at the inherently elusive goal of perfect diversity. The court of appeals should not have supplanted the Commission's reasoned judgment with its own preferred scheme of radio regulation.

A. The Commission reasonably concluded that regulating entertainment formats would present intractable administrative problems

The court of appeals brushed aside the administrative problems created by its format doctrine.²⁰ Nonetheless, the Commission's Opinion clearly demonstrates that the "acute practical problem[s]" inherent in format regulation render entirely speculative any benefits that such regulation might produce.

²⁰ The court sought to characterize the Commission's concern over the problems created by the "format doctrine" as an agency's lament over its workload (Pet. App. 17a-20a). The Commission's concern, however, stems from the injurious effect of the format doctrine on the public interest. As the Commission explained (Pet. App. 131a): "The people are entitled to expect that the broadcast industry will respond to * * * changing tastes * * * without having to endure the delay and inconvenience that would be inevitable if permission to change had to be sought from a government agency, particularly after a full-scale evidentiary hearing."

1. *Formats cannot be classified in a manner that corresponds with actual listener preference*

Under the court of appeals' format doctrine, the Commission is required to analyze the licensee's existing and proposed entertainment formats and to determine whether the change is consistent with the public interest. The Commission must also define and categorize the formats of other radio stations in the local market to determine the extent to which any of those duplicate the format sought to be changed.

The Commission found that this classification process was "highly subjective" (Pet. App. 185a-186a). The "inability of even the most seasoned broadcaster to objectively evaluate a station's programming" is an acknowledged fact in the radio industry. See E. Routt, J. McGrath & F. Weiss, *The Radio Format Conundrum* 4 (1978).²¹ Classifying radio broadcasts

²¹ As Routt, McGrath & Weiss point out, "[i]t is almost impossible to get two non-associates in radio broadcasting to totally agree on what, for example, a Top 40 radio station is and what makes it altogether different from, perhaps, a station featuring or emphasizing a 'much more music' sound." *Id.* at 4. The court of appeals has never suggested an approach to format classification that is not inherently subjective. See *Citizens Committee (Atlanta) v. FCC*, *supra*, 436 F.2d at 265 n.1. Although the Commission's staff relied on a rough delineation of program types or formats (Pet. App. 169a-170a), the staff was careful to point out that its classifications were "subjective * * * [and] by no means fully reflect the breadth and variety of programming available to listeners." The staff added that "any effort to classify formats will be arbitrary" (Pet. App. 160a-161a).

into meaningful "formats" is impractical because each broadcast represents a unique combination of many elements: music type, selection, and placement; announcers, personalities, and guests; news selection, emphasis, and scheduling; placement, number, and quality of commercial and public service announcements; and amount, variety, and scheduling of sports, weather, traffic reports, and specialty features (Pet. App. 127a). See also J.A. 76-91. As the Commission explained, "radio listeners identify in radio formats idiosyncracies which are too fleeting to be caught in the clumsy nets of legal formulations" (Pet. App. 100a). In short, the problem of identifying an entertainment format, determining whether it has changed, and determining whether it is unique, defies principled resolution.²²

Efforts to classify formats and ascertain whether substitutes exist have necessitated protracted evidentiary hearings. *Citizens Committee to Save WEFM v. FCC*, *supra*, is an example. In that case, following remand from the court of appeals, the administrative law judge was required to hear extensive testimony from musicologists regarding dif-

²² Commissioner Robinson summarized the dilemma (Pet. App. 91a-92a): "Shall a station that bills itself as, say, a 'fine arts' station be deemed to have altered its predominantly classical music format by playing Victor Herbert? One possible answer may be that Beverly Sills' rendition of a Victor Herbert tune is 'fine arts' while Jeanette MacDonald, singing the same selection, is 'easy listening' or 'golden oldies.' * * * How many 'bites' of John Philip Sousa do we permit a classical music station to take?"

ferences and similarities between WEFM's classical programming and that of other stations. The composers, their historical periods, the manner of presentation (including time of broadcast, frequency, "ideological or stylistic clusterings," pairing of composers, and the broadcaster's tendency to be "eclectic" rather than "ideological"), the size of the stations' record libraries, the results of audience surveys, and a host of other factors were dissected by expert and lay witnesses. On the basis of this miscellaneous data, the Commission was expected to determine whether the classical musical programming of the station was "unique."²³

²³ See *Zenith Radio Corp.*, Docket No. 20581, FCC 76D-47 (Initial Decision, Aug. 30, 1976) at ¶¶ 4-20, 51-60. Arguments have been made to the Commission that "rhythm and blues" is not an adequate substitute for "jazz" (*Riverside Broadcasting Co., Inc.*, 64 F.C.C.2d 866 (1976)), that "beautiful" music is not a substitute for "popular standard" music (*Post-Newsweek Stations, Florida, Inc.*, 57 F.C.C.2d 326 (1975)), that "laid back, progressive" music is not an alternative to "bubblegum rock" music (*SRD Broadcasting, Inc.*, 57 F.C.C.2d 354, 357 (1975)), and that "middle-of-the-road, easy listening" music is not a substitute for "adult contemporary album" music (*McCormick Communications, Inc.*, 68 F.C.C.2d 507, 508 n.1 (1978)). See also Pet. App. 99a (protesting listeners argue that the absence of "loud, fast rock" on a "folk-folk/rock" station makes the station different from other stations that "contain one or more decibel piercing, upbeat rock or jazz selections" in any single hour). The court of appeals has encouraged these contentions by perceiving decisionally significant differences between "classical" and "fine arts" formats (*WEFM, supra*, 506 F.2d at 264-265), between nineteenth and twentieth century classical music (*id.* at 264-265 n.28), and between "progressive rock" and other varieties of rock (*Progressive Rock, supra*, 478 F.2d at 932).

The court of appeals suggested that the Commission could minimize these difficulties by developing "a format taxonomy which, even if imprecise at the margins, would be sustainable * * *" (Pet. App. 29a). But imprecision "at the margins" makes controversial classifications impossible and gives rise to protracted litigation. Inevitably, the Commission will be called upon to justify—and will be unable to justify—strict application of any format classification rule in marginal cases.

The court of appeals also suggested that the Commission could "dispens[e] altogether with the need for classifying formats by simply taking the existence of significant and bonafide listener protest as sufficient evidence that the station's endangered programming has certain unique features * * *" (Pet. App. 30a n.47). Apart from the difficulty of defining what is a "significant" protest in any particular instance, the court's suggestion would be of help only in turning back hearing requests; it would provide no assistance once a case proceeds to hearing. At that stage, the Commission would be required to attempt to analyze the proffered evidence of uniqueness and substitutability.²⁴

²⁴ Format classification involves two questions. Has the station's format been changed? Are there substitutes for the abandoned format? The former question will often involve difficult questions of classification; the latter question almost always will. The Commission will be required to examine the programming of all other stations in the local market and attempt to determine whether their differences and similarities justify a conclusion that they are reasonable substitutes.

2. The intensity of listener interest cannot be ascertained

Unrebutted evidence before the Commission established that it is not possible accurately to ascertain the intensity of radio listener interest in particular entertainment formats.²⁵ In light of this fact, the Commission concluded that it could not rationally determine in any particular case whether the public interest would better be served by adoption of one program format or another (Pet. App. 129a-130a). The court of appeals rejected the Commission's determination by relying on its own "common sense" understanding of the marketplace (Pet. App. 37a). In the court's view, if a program format is abandoned, listeners will turn to a substitute; if no close substitute is available in the market, there will be a loss of "diversity" and the welfare of the public will be diminished. That analysis, however, has no basis in the Communications Act of 1934 and conflicts with the Commission's expert judgment.

Because it is not possible to measure the intensity of listener interest in particular program formats, the Commission cannot, for example, determine whether the loss of a classical format and the replacement of that format with a popular format increases or decreases listener satisfaction. Even though there may be other popular stations in the marketplace and no other classical station, a new

²⁵ This finding was supported by the Commission's staff analysis (Pet. App. 156a-170a), and by expert testimony presented to the Commission (J.A. 31-37).

popular station with different announcers, a novel arrangement of music, or a different blend of music and news broadcasts, may increase overall listener satisfaction. The intensity of public demand for diversified programming within the popular format may substantially outweigh the intensity of demand for the classical format.²⁶

In short, the court of appeals' insistence on its own goal of perfect "diversity" could diminish rather than increase aggregate listener welfare. This, of course, is not an unlikely inference, since a change in program format in a competitive marketplace represents a flexible response by radio station management to perceived changes in listener demand. For that reason, as the dissenting judges in the court below pointed out, the format doctrine "calculates the public interest without necessary reference to the aural desires of the greatest number of listeners" (Pet. App. 50a). Because the Commission cannot meaningfully measure the intensity of listener interest in particular formats, it reasonably cast its lot with the marketplace. As it explained, "unless we were to favor regulation for its own sake, it

²⁶ Because intensity of preference is not subject to measurement, the number of listeners who prefer a particular format is not decisive. As the dissenting judges in the court below pointed out (Pet. App. 53a): "If twenty percent of the listening audience would mildly prefer a second top 40 format and five percent would vigorously prefer retention of the classical format, does the size of one audience outweigh the intensity of preference of the other? The majority opinion offers no clue."

would be hard to justify rules which for all we know may do more harm than good" (Pet. App. 183a).

Nor is it feasible for the Commission to attempt to assess public satisfaction with format changes based on listener "grumbling." The court of appeals, in offering that suggestion, ignored the difficulties the agency would face in tailoring an assessment of public protest to markets of different sizes and compositions and in ensuring that the "grumbling" reflects an actual preference for existing over proposed formats. See J.A. 30-31. As the dissenting judges in the court of appeals recognized (Pet. App. 50a), a Commission "referendum" whenever a radio station seeks to modify its format would hardly be "practicable" in the dynamic radio broadcasting industry.²⁷

²⁷ The court of appeals referred to the survey of listeners in *Citizens Committee (Atlanta) v. FCC*, *supra*, to support the proposition that "16% of the listeners [in Atlanta] preferred classical music" (Pet. App. 36a n.52). This survey, in the court's view, showed that the market failed to accommodate the interests of a substantial group of listeners. In fact, however, the survey merely showed that 16% of the persons contacted preferred a blend of opera and ballet music to a blend of Broadway show tunes and movie tunes. *Glenkaren Associates, Inc.*, 19 F.C.C.2d 13, 14 (1969). The court's suggestion that this survey showed that the Atlanta market was failing to respond to listener tastes is wholly mistaken. If, in fact, a classical music format attracted 16% of Atlanta's radio listeners, the station broadcasting that format would almost certainly have more listeners than any other station in the market. (Recent surveys show that none of the 23 stations in the Atlanta market currently attracts more than 15.3% of the listening audience. The one station currently

The absence of any reliable indicator of the intensity of listener interest makes it impossible for the Commission to weigh the relative public interest values of a unique and non-unique format, or of two unique formats. When a unique format is replaced by a duplicative format, there may be a loss in diversity but an increase in overall listener satisfaction.²⁸ The Commission has no way to second-guess the broadcaster in determining whether such a change responds to listener demand. Similarly, when a unique format is abandoned in favor of another unique format, the Commission has no basis for determining whether there has been a net gain or loss in listener welfare. In these circumstances, intervention by the government threatens the freedom of radio broadcasters with no discernible benefit to radio listeners.

broadcasting classical music attracts only 1.3% of listeners. See J. Duncan, *American Radio*, Vol. III, No. 1 (1979)). The fact that the classical format in question in the *Atlanta* case was being abandoned is a clear demonstration that it did *not* attract 16% of the listeners.

²⁸ The court of appeals has stated that, in this situation, it is "axiomatic" that the public interest will be served by perpetuation of the existing format. *Citizens Committee to Save WEFM v. FCC*, *supra*, 506 F.2d at 268. The decision below, however, suggests that while loss of a "unique" format is presumptively undesirable, other countervailing factors may also be considered (Pet. App. 25a, 31a-32a, 37a). Suffice it to say, the Commission has no calculus to ascertain comparative listener satisfaction in such a situation.

3. *A finding of financial viability would be entirely speculative*

The court of appeals' format doctrine also requires the Commission to determine if a unique format proposed to be abandoned is financially "viable." It may be abandoned, according to the court of appeals, "if the format itself is * * * economically unfeasible in the particular market—i.e., if even an efficiently managed station would have no realistic prospect of economic viability * * *" (Pet. App. 6a). See also *Citizens Committee to Save WEFM v. FCC*, *supra*, 506 F.2d at 265-266. The Commission properly characterized this as "an almost fantastically speculative point for inquiry," since the court would require the Commission to determine not whether the station had in fact been financially viable, but whether it *might* have been viable under hypothetical circumstances (Pet. App. 127a n.5).

The court of appeals offered no assistance in defining "viability." That term may imply a reasonable rate of return on investment. If so, to determine a format's "economic viability," the Commission would first have to decide what constitutes a reasonable return on investment in a particular broadcast market.²⁹ Next, it would be required to decide whether an "efficiently managed" station would have a "realistic prospect" of achieving that

²⁹ Proponents of format regulation have urged such an approach (C.A. App. 414-415; see also *id.* at 216-219). Profitability varies, of course, from year to year and from local market to local market.

rate of return with a particular "unique" format. Finally, if the Commission were to find that a well-managed station could achieve a reasonable rate of return while retaining the format, the format doctrine would ordinarily require that the format be retained.

The Commission properly rejected a regulatory role that would require it to examine the licensee's financial affairs, to make conjectures about its profitability under hypothetical conditions, and to dictate continuance of unwanted programming. It correctly concluded that this kind of regulation would convert the licensee into a common carrier in violation of Section 3(h) of the Communications Act, 47 U.S.C. 153(h). See pages 24-26, *supra*.³⁰

B. The Commission reasonably concluded that competition, rather than regulation, produces diversity in entertainment broadcasting desired by the listening public

Having examined the many pitfalls to administrative regulation of entertainment formats, the

³⁰ Those witnesses who urged the Commission to adopt a policy of format regulation recognized that the doctrine entails "common carrier" obligations. See Comments of United Church of Christ (C.A. App. 341), arguing that determination of financial viability "is a task which rate regulating bodies perform every day in the week. The Commission exercises similar responsibilities in regulating common carriers * * *." See also Comments of Frank Kahn (*id.* at 363): "Broadcasting is most properly to be regarded and regulated as a quasi-utility." Needless to say, this philosophy directly contradicts the decisions of this Court which establish that the field of broadcasting is one of free competition. See page 27, *supra*.

Commission considered the merits of continued reliance on free competition in achieving the program diversity desired by radio listeners. The decision in favor of competition is a classic example of an informed judgment by an administrative agency regarding what is best suited to serve the "public interest." Contrary to the suggestions of the court of appeals, the Commission did not "simply throw up its hands" or cast off its statutory responsibilities (Pet. App. 28a). Rather, the Commission affirmatively found that the free functioning of the marketplace would better serve the public interest than governmental regulation. This is true because free competition encourages rather than stifles innovation in programming and because competition allows listeners to obtain desired diversity within entertainment formats.

1. Government regulation stifles innovation that occurs under competitive conditions

While the Commission recognized that the marketplace is not a "completely faithful" mirror of listening preferences, it nonetheless found that reliance on competition is "the best available means of producing the diversity to which the public is entitled" (Pet. App. 128a). The Commission noted that there is no evidence that the entertainment tastes of substantial groups of listeners have been ignored under competitive conditions (*id.* at 182a), and that competition produces "program diversity of a sort, and in a form, that equates both to the welfare of radio

listeners and to the public interest generally" (*id.* at 124a). The Commission also determined that "allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate" (*id.* at 131a). That flexibility permits broadcasters to respond quickly to changes in listener tastes (*ibid.*).³¹ The conclusion of the court of appeals that "breakdowns" in competition prevent listeners from enjoying programming that they prefer rests on no factual record and disagrees with the Commission's experience and the evidence presented in this proceeding.

The Commission also found that regulation of format changes would discourage innovation and experimentation by "locking" stations into existing programming. Pet. App. 129a-132a. The chilling effect on program innovation is not difficult to identify.³²

³¹ Compare *New York City Fever: Disco Sound Propels WKTU to the Top*, Wall St. J., Jan. 26, 1979, at 1, col. 4, with *Disco-Music Craze Seems to be Fading; Record Makers Glad; Radio Stations Drop Format or Vary Their Programs*, Wall St. J., Oct. 22, 1979, at 1, col. 4.

³² *Citizens Committee to Save Progressive Rock v. FCC*, *supra*, provides a useful illustration. The broadcaster in that case had experimented with a series of different format types, found none to be successful, and agreed to sell its station. While awaiting Commission approval, it experimented with yet another format. When it became known that the buyer did not intend to continue that format, listeners filed protests with the Commission and sought to block the sale. The court of appeals required a hearing to determine whether loss of the experimental format was in the public interest. It is obvi-

The prospect of substantial regulatory burdens is an ever-present risk for a broadcaster who cannot know in advance whether a future format change will arouse public "grumbling," whether his assessment of "financial viability" will be challenged, or whether an agency or reviewing court will classify his programming as a "unique format" and require its continuation. These problems are intensified when a broadcaster experiments with specialty programming—programming designed to appeal to limited ethnic or cultural groups, or audiences desiring "all news" or "all talk" shows. Such programs are high risk ventures; they entail large expense and appeal to narrow audiences. The threat of expensive legal proceedings or an administrative order requiring perpetuation of such programming is a compelling disincentive.³³ In short, the court of appeals' format doctrine is counterproductive, actually discouraging unique programming directed to specialized audiences, and thus *reducing* available diversity in the marketplace. As the Commission explained (Pet. App. 132a-133a):

ous that a similarly situated station would be deterred from experimenting with new formats if it faced the threat of protracted litigation or an order from the Commission requiring it to continue an unwanted format.

³³ One of the expert witnesses who provided testimony in this proceeding noted that it "is doubtful whether such relatively recent innovations as the 'all news' format could have arisen under the WEFM rule" (J.A. 33).

Under the threat of a hearing that could cost tens or hundreds of thousands of dollars, many licensees might consider the risks of undertaking innovative or novel programming altogether unacceptable. Several commenting parties mentioned this effect, and we regard it as of great importance.³⁴

2. Competition permits broadcasters to diversify programming within formats as desired by listeners

The Commission also found that unregulated competition in the marketplace permits listeners "to give a rough expression of whether their preference for diversity *within* a given format outweighs the desire for diversity *among different formats*" (Pet. App. 129a; emphasis in original). The Commission explained (*ibid.*):

[W]ith respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of * * * formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations,

³⁴ The court of appeals largely ignored this issue, stating simply that the Commission could deal with the "lock-in" problem created by the format doctrine by adopting rules "exempt[ing] from the hearing requirement formats adopted experimentally and sought to be abandoned after a very short period of time" (Pet. App. 31a). That, however, simply adds another layer of regulation and ignores the reality that public acceptance of a new program often requires a substantial period of development.

there would be no reason for them to co-exist—and little economic likelihood that they would.

In contrast to the court of appeals' presumption that the public interest can only be served by compulsory proliferation of formats, the Commission recognized that diversification within format types is also in the public interest (Pet. App. 128a-131a; 99a-103a). The Commission added that "efforts to maximize format diversity through regulatory fiat could very well result in a diminution of consumer welfare; a format protected under the WEFM rationale may be of lesser value than the format which the broadcaster proposes to substitute" (Pet. App. 130a). Thus, rather than compelling broadcasters to perpetuate programming labelled by the government as "unique," the Commission's approach allows broadcasters vigorously to compete in providing listeners with variations of popular programming which they desire.³⁵

In sum, the Commission expressed a reasonable basis for its determination that free competition pro-

³⁵ Abandonment of a program format by a broadcaster in a competitive market does *not* mean that the format is lost forever. Experience demonstrates that formats are frequently re-adopted shortly after abandonment. "The Commission's accumulated experience indicates that licensees frequently shift and modify their entertainment formats in response to changing listening tastes, competition, and financial necessity. Frequently, when a station changes its format, other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format. This view has been borne out in two previous format change cases in which the 'gap' left by Commission approval of a change of format was quickly filled by another station serving the same area" (Pet. App. 68a).

duces entertainment programming best adapted to the changing tastes and interests of the listening public. Under familiar principles of administrative law, the court of appeals should have upheld that determination.

III. FIRST AMENDMENT CONSIDERATIONS MILITATE AGAINST UNNECESSARY REGULATION OF PROGRAM FORMATS

First Amendment principles strongly support the Commission's view that it should not undertake to regulate the content of entertainment programming. See Pet. App. 71a-72a; 132a-134a; 185a-189a. Despite the content-oriented nature of format regulation, the court of appeals has refused to "grapple seriously with the constitutional implications of its decision" (see concurring opinion of Bazelon, J.; Pet. App. 42a). In dismissing the Commission's concerns over the First Amendment consequences of format regulation, the court failed to heed this Court's admonition that the expert views of the Commission on First Amendment issues arising in the field of broadcasting are entitled to "great weight." *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 102.

1. The First Amendment rights of broadcasters differ, of course, from those of participants in other communications media. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In the limited broadcast spectrum, it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390.

Nevertheless, this Court has confirmed that broadcasters are entitled to exercise "the widest journalistic freedom consistent with [their] public obligations." *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 110. And no court has ever held that the Constitution permits the Commission to foreclose conventional entertainment programming or to dictate what may be broadcast. See *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 396; *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 480 (2d Cir. 1971).³⁶

2. The court of appeals' format doctrine requires that, in at least some instances, the Commission must interfere with the broadcaster's selection of programming because the public interest would be "better served" by some alternative programming. As Judge Bazelon noted, "regulation of entertainment formats is not content neutral. The regulator is inevitably led to favor some forms of expression over

³⁶ *FCC v. Pacifica Foundation*, *supra*, upheld Commission sanctions based on an explicit statutory mandate (18 U.S.C. 1464), when a broadcaster repeatedly carried indecent programming in the afternoon hours. Justice Powell emphasized in his separate opinion in that case that "I do not subscribe to the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." 438 U.S. at 761. The court of appeals' format doctrine requires just such a valuation, affording substantial protection to entertainment programming which is "unique" and denying protection to programming which is "duplicative."

others" (Pet. App. 42a). The court of appeals' assertion that, under the format doctrine, the Commission does not "interfere with licensee programming choices" or "force retention of an existing format" (Pet. App. 25a-26a) is inexplicable and at odds with prior assertions of the court (see page 6, *supra*).³⁷ The court's statement that the agency need only take a station's format change "into consideration in deciding whether to grant certain applications" (Pet. App. 25a) is misleadingly benign. If, as the court has repeatedly stated, the retention of a "unique" format is in the public interest and adoption of a new format is not, then the Commission must, under the court's analysis, refuse to grant applications which would reduce program "diversity."³⁸ To do

³⁷ The court of appeals itself has exercised such powers on an interlocutory basis. In *Citizens Committee to Save WEFM v. FCC*, *supra*, the court effectively required the broadcasting of a specific type of program when it permitted the assignee to obtain the license in dispute pending the outcome of the case only upon the condition that the assignee continue to broadcast the classical music format that it wished to abandon. *Citizens Committee to Save WEFM v. FCC*, No. 73-1057 (D.C. Cir. Apr. 23, 1973). Compulsion to retain that unwanted format remained in effect for nearly two years while litigation was pending before the court, and for over three additional years while the agency conducted an administrative hearing on remand. See *Zenith Radio Corp.*, Docket No. 20581, FCC 76D-47 (Aug. 30, 1976) (initial decision on remand); *Zenith Radio Corp.*, 42 Rad. Reg.2d (P&F) 472 (1978) (order approving settlement and terminating proceeding).

³⁸ In its decision below, the court of appeals admonished the Commission that it could not "administer the format cases as a dead letter." The court added that the Commission must

so, however, would unquestionably restrain the broadcasting of new programming and threaten the First Amendment rights of broadcasters.³⁹

The format doctrine also discriminates against certain categories of listeners in a manner that raises serious First Amendment questions. The court of appeals would apparently accord little or no significance to the listening preferences of those who would prefer new programming proposed by a broadcaster who seeks to abandon a unique format. See Pet. App. 130a, 134a, 190a-192a. The Commission properly rejected a regulatory role that would require it to favor the programs desired by one group of listeners while ignoring the preferences of other groups. In this respect, the Commission's decision agrees with this Court's observation in *Red Lion* that it is the rights of viewers and listeners "as a whole" that are paramount, not the rights of particular segments of the listening public. 395 U.S. at 390.⁴⁰

be alert to "rectify" situations in which the market has "failed"—situations in which "the public interest would not be served by granting the [broadcaster's] application" (Pet. App. 31a-32a).

³⁹ The court's unelaborated statement that the Commission may also consider "other factors bearing on the public interest" in addition to the factor of lost format diversity (Pet. App. 5a) may leave the Commission some discretion to approve an occasional application. But the court's statement does not eliminate the conduct-restraining thrust of its format doctrine.

⁴⁰ The court of appeals in *WEFM* stated that Commission oversight of non-entertainment formats implies that format

3. In addition to a degree of compulsion in the court of appeals' format doctrine, there is an element of deterrence which threatens First Amendment rights. The existence of a policy of format regulation significantly chills a broadcaster's willingness to abandon an existing unique format and inhibits innovation in new formats.⁴¹ See pages 46-49, *supra*. This chilling effect is intensified by the inherent vagueness of format analysis. See pages 36-39, *supra*.

regulation is consistent with the First Amendment. 506 F.2d at 267. The Commission does require ascertainment of the non-entertainment needs of the public and does maintain guidelines encouraging a minimum amount of news and public affairs programming. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C. 2d 418 (1976); 47 C.F.R. 0.281(a) (8). In radio, the need for such regulation is currently subject to reexamination. See *Deregulation of Radio*, 73 F.C.C. 2d 457 (1979). The Commission's requirements in the field of non-entertainment broadcasting are far less intrusive than the court of appeals' format doctrine. The Commission has never required a station to justify its change from one news or public affairs format to another, and has not attempted to prescribe the content of such broadcasting. Moreover, in contrast to the court of appeals' format doctrine, the Commission's requirements relate only to a narrow portion of the broadcaster's total programming. As the Commission explained (Pet. App. 187a-188a): "These regulations are extremely narrow, the Commission's role is limited by strictly defined standards, and the licensee is left with virtually unrestricted discretion in programming most of the broadcast day."

⁴¹ The Commission anticipated that this would affect most severely potential new owners of broadcast stations and prospective licensees of limited financial means. Such persons, including minority groups within the community, would have limited ability to meet the cost of format litigation (Pet. App. 185a).

The Commission correctly concluded that the elusive and subjective standards inherent in format regulation underscore the desirability of relying on competition rather than regulation to achieve diversity. As this Court observed in *FCC v. National Citizens Comm. for Broadcasting*, *supra*, 436 U.S. at 796-797, "[d]iversity and its effects are * * * elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds."

The chilling effect of format regulation is also intensified by the continuing agency oversight that attends it. The Commission would be required to adjudicate complaints that a broadcaster had in practice varied from programming that he promised to present when his license was obtained or renewed. The Commission would thus intrude further into the day-to-day operations of broadcasters than was required under the access scheme mandated by the court of appeals and set aside by this Court in *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 126-127. See Pet. App. 107a-108a, 133a-134a, 186a-189a. In *CBS*, the intrusion was limited to a particular aspect of the licensee's programming—editorial advertising. Here, by contrast, the Commission's role would extend to the station's entire program schedule and involve a "comprehensive, discriminating, and continuing state surveillance * * *" (Pet. App. 134a).

4. In light of the substantial First Amendment values at stake, the legitimate objective of program

diversity should be pursued through means that are the least intrusive. *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). As the Commission found in this case, the least intrusive method to achieve program diversity is free competition. It is ironic that the court of appeals' format doctrine not only is *more* restrictive of broadcasters' First Amendment rights than free competition, but also is *less* likely to achieve an equivalent level of diversity. As this Court emphasized in *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 127, "[t]o sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result." Here, the sacrifice of First Amendment rights resulting from enforcement of the format doctrine would be at least as great as in *CBS*. And the public interest gain would be even more speculative, since any theoretical increase in "diversity" would be offset by a diminution of competition within format types and a significant loss of program innovation.⁴²

⁴² Rather than attempting to compel diversity through regulation of program content, the Commission has sought to encourage diversity through structural reforms. For example, the Commission has adopted policies to increase minority employment in the broadcast industry and to increase minority ownership of broadcast facilities. See *Non-Discrimination in Employment Practices*, 60 F.C.C.2d 226 (1976); *Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978). The Commission has also sought to expand the frequency space available for radio broadcasting to make channels available for more broadcasting stations. See *Availability of*

In sum, the Commission's First Amendment concerns are substantial and strongly support its determination that competition, rather than regulation, is the preferable means for achieving diversity in entertainment programming.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1980

Commercial FM Broadcast Assignments, 45 Fed. Reg. 17602 (1980); *AM Channel Spacing*, 44 Fed. Reg. 39550 (1979); *World Administrative Radio Conference Proposals*, 70 F.C.C.2d 1193, 1211-1214 (1979); *Clear Channel Stations*, 40 Fed. Reg. 58467 (1975), 44 Fed. Reg. 4502 (1979).

APPENDIX

Relevant portions of the Communications Act of 1934, ch. 652, 48 Stat. 1064, 47 U.S.C. 151 *et seq.*, are reproduced below:

Section 3(h), 47 U.S.C. 153(h), provides:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

Section 303(g), 47 U.S.C. 303(g), provides:

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 309(a), 47 U.S.C. 309(a), provides:

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon con-

sideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

Section 310(d), 47 U.S.C. 310(d), provides:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 326, 47 U.S.C. 326, provides:

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Section 402(b), 47 U.S.C. 402(b), provides:

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this Act whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

(8) By any radio operator whose license has been suspended by the Commission.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners

v.

WNCN LISTENERS GUILD, *et al.*

INSILCO BROADCASTING CORPORATION, *et al.*,

Petitioners

v.

WNCN LISTENERS GUILD, *et al.*

AMERICAN BROADCASTING COMPANIES, INC., *et al.*,

Petitioners

v.

WNCN LISTENERS GUILD, *et al.*

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,

Petitioners

v.

WNCN LISTENERS GUILD, *et al.*

On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit

BRIEF FOR INSILCO BROADCASTING CORPORATION,
INSILCO BROADCASTING CORPORATION OF
LOUISIANA, INC., INSILCO RADIO OF OKLAHOMA,
INSILCO BROADCASTING CORPORATION OF
OKLAHOMA, INC., McCLATCHY NEWSPAPERS,
NEWHOUSE BROADCASTING CORPORATION, PALMER
BROADCASTING COMPANY, PLOUGH BROADCASTING
COMPANY, INC.

OPINIONS BELOW

The opinion of the court of appeals (FCC App. 1a-56a) is reported at 610 F.2d 838. The Notice of Inquiry and Orders of the Federal Communications Commission (FCC App. 60a-116a, 117a-175a, 176a-196a) are reported at 57 F.C.C.2d 580, 60 F.C.C.2d 858, and 66 F.C.C.2d 78.

JURISDICTION

The judgment of the court of appeals (FCC App. 57a-59a) was entered on June 29, 1979. The petitions for a writ of certiorari were filed on November 26, 1979, within the period for filing as extended by the Chief Justice. The petitions were granted on March 3, 1980. This Court's jurisdiction rests on 28 U.S.C. §§1254(a) and 2350(a).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly concluded that the statutory goal of diverse programming was best served by a policy of not regulating radio station formats.

2. Whether a judicially-imposed policy requiring radio format regulation would violate the First Amendment

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of the Constitution of the United States and the Communications Act of 1934, as amended, 47 U.S.C. §151, *et seq.*, are set forth in the Appendix attached to this brief.

STATEMENT

The United States Court of Appeals for the District of Columbia Circuit ruled in a series of cases¹ that the Federal Communications Commission is obligated by statute to hold hearings on certain radio stations' format changes. The Commission, troubled by the difficulties of regulating formats, initiated notice and comment proceedings² culminating in a decision (the "Policy Statement")³ to abstain from regulating radio formats. At issue is the court of appeals' ruling that the *Policy Statement* is "unavailing and of no force and effect." *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 858 (D.C. Cir. 1979) (FCC App. 1a, 40a).

Commercial and noncommercial radio stations compete for listeners by broadcasting music, informational programs and promotional materials in different combinations. The precise mix of program material, performers and technical presentation is unique to each station. Often these techniques are elaborate.

Most radio programmers adjust their selection of material to respond to the desires of the listening audience, and various groups within it, for particular music and information. The style of presentation is found through audience research to be an important component in listeners' choice of station. The radio marketplace is dynamic, responding to constantly changing listeners' preferences.

¹ *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Lakewood Broadcasting Serv., Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970). See also *Hartford Communications Comm. v. FCC*, 467 F.2d 408 (D.C. Cir. 1972).

² *Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580 (1976) ("Notice of Inquiry") (FCC App. 60a).

³ *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976) ("Policy Statement") (FCC App. 117a), *reconsid. denied*, 66 F.C.C.2d 78 (1977) (FCC App. 176a).

No precise definition of a radio "format" exists. Indeed, the elusiveness of the term "format" lies at the center of this case. Virtually any of the definitions favored by the Commission, the court of appeals or the litigants use highly subjective terms and widely different schemes for classifying various combinations of music and informational programming. These differences reflect the critical yet intensely personal preferences that exist among radio listeners, providing the constant challenge to innovate which motivates radio broadcasting in this country.⁴

For many years radio stations changed their programming at will, in the middle of a license term or in connection with a change of ownership, without interference from the Commission or courts. However, beginning in 1970, audience groups began to challenge licensees' format changes. In *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970), the Commission had decided that a hearing was unnecessary to determine the public interest consequences⁵ of a proposed station sale that included plans

⁴ See *Notice of Inquiry*, 57 F.C.C.2d at 594-95 (Commissioner Robinson, concurring) (FCC App. 93a-94a);

[E]ven with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. For example, in most large markets there are a number of middle-of-the-road formats which seem identical on any objective or quantifiable basis; yet they are far from interchangeable to their respective audiences. Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would. Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" and citizens' groups (and, alas, appellate judges) call format. (Footnote omitted.)

⁵ The standard of the "public interest, convenience, and necessity" is prescribed in Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. §309(a).

for changing format from classical music to "a 'blend of popular favorites, Broadway hits, musical standards, and light classics.'" 436 F.2d at 265. The court of appeals concluded that a hearing was necessary to resolve substantial factual issues, including the degree of public dissatisfaction with the proposed format change and the extent to which the Atlanta audience could rely on other sources for classical music.

The opinion discusses a 1969 statistical survey, taken by the proposed buyer, of format preferences in Atlanta. 640 people were asked which of two formats they preferred: a blend of show tunes, movie themes and standards with news; or opera, symphonic pieces, ballet and news. 73% preferred the first format, and 16% preferred the second. The court of appeals, however, interpreted this survey as demonstrating that 16% of the Atlanta audience preferred classical music to all other radio formats in the market,⁶ even though the survey actually showed only that 16% of the population (as represented by the statistical sample) preferred the second format in the survey to the first format. The survey's methodology left open the question of whether the 16% might prefer other formats to the ones used in the study. It also did not try to measure intensity of preference. The court of appeals concluded that "it is surely in the public interest . . . for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." 436 F.2d at 269. However, the court did not examine any legislative history bearing on this interpretation of the public interest, nor did it probe the First Amendment ramifications of requiring a hearing on format matters.

In *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973), the court declared that the

⁶ "We do not doubt that, at our present level of civilization, a 16% ratio between devotees of classical music and the rest of the population is about right, for Atlanta as well as for other American cities. . . ." 436 F.2d at 269.

Commission had improperly approved a contested transfer of a radio station in Sylvania, Ohio, near Toledo, because a hearing was not held. The station had unsuccessfully tried "country and western" and "golden [rock and roll] oldies" formats; shortly before the pending sale it installed a "progressive rock" format as an experiment. Although this latest change brought success, the buyer's somewhat vague proposal contemplated a change to "'generally middle of the road music [including] some contemporary, folk and jazz, similar to what [the] station is currently programming.'" *Id.* at 928 (footnote omitted). An *ad hoc* committee was formed to protest the change from "progressive rock." *Id.*

The *Progressive Rock* court, applying *Atlanta*, required a hearing, not on the station's financial condition as a result of using the "progressive rock" format, but on the issue of whether that format was "so economically unfeasible that an assignment encompassing a *format change* should be granted." *Id.* at 931 (emphasis in original). The court of appeals also declared that two "top forty [rock and roll]" stations in the Toledo area could *not* be deemed sufficient substitutes for the "progressive rock" station, because "[w]e deal here with format, not occasional duplication of selections." *Id.* at 932. The degree to which the two kinds of formats were fungible was to be resolved in a hearing. As before, the court of appeals presented no legislative history to support this view of the "public interest" standard, nor did it consider constitutional questions raised by restricting the licensee's selection of program material.

In *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*), the court of appeals consolidated its previous format decisions and established guidelines for the Commission's consideration of future format disputes. The case involved WEFM, a radio station in Chicago that lost money for several years using a classical music format. An agreement for sale was entered, with the new owner proposing a "contemporary" or "rock music" format. *Id.* at 254 n.4, 255.

Following protest by a citizens' group, the Commission concluded that a hearing was unnecessary and approved the transfer. The Commission reasoned that two other classical radio stations in Chicago provided substitute service. In a separate statement, six Commissioners declared that the public interest was best served by allowing format changes to be governed by competition in the marketplace rather than by regulation. *Id.* at 257-58.

The court of appeals overturned the Commission's decision. It relied on the *Atlanta* case, emphasizing the public interest in diversity of entertainment formats and in avoiding format changes that appeared detrimental to the public interest. The court, referring to its erroneous interpretation in *Atlanta* that 16% of the audience desired classical music above all else, emphasized the need in such cases to accommodate all major aspects of contemporary culture when technically and economically possible. *Id.* at 260-61. The court reversed the Commission's finding that the two other classical music stations in Chicago were reasonable substitutes for WEFM's classical format, observing that the record on this point was insufficient. One of the stations served a substantially smaller geographic area and the other station had a "fine arts" rather than a "classical music" format. The court held that "classical" and "fine arts" formats could not, without a hearing, be deemed reasonable substitutes. *Id.* at 262-65.

The court disputed the six Commissioners who stated that market determination of formats was preferable to regulation. The court said: "We think it *axiomatic* that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest." *Id.* at 268 (emphasis supplied, footnote omitted). The court did not rely on legislative history nor did it assess the impact of this doctrine on First Amendment freedoms.

Following the decision in *WEFM* the Commission issued a notice of inquiry⁷ to consider, for the first time, comprehensive legislative development of a radio format policy. The Commission was frankly concerned with the practical difficulties of implementing *WEFM* in a sensible way, and expected that even vigorous implementation would be of little value to the "public interest." The Commission was also gravely worried about constitutional difficulties that seemed to pervade the court of appeals' approach.

After comments and replies were received the Commission issued its *Policy Statement*,⁸ announcing that it would no longer intervene to block format changes. The Commission concluded that putting radio programming in categories—whether relatively broad or narrow—was of little value. Comments, supported by a Commission staff study, showed that any format classification system was largely arbitrary, and that listeners perceived as much difference between stations within the same format category as they did between stations in different categories.⁹ In the words of the study, "the variation in audience shares within given format types is nearly as large as the variation between different types. Again, this indicates that formats of the same type . . . are not close substitutes for one another."¹⁰

The Commission also recognized that the value of a format in a given market depends on aggregate intensity of preference for each form or sub-format. No measure of this factor exists.¹¹ Since the Commission could not discover any consistent way to measure differences in the intensity of audience preferences for various formats, it could not determine a net public interest gain or loss resulting from the replacement of one format by another.¹²

⁷ *Supra* n.2 (FCC App. 60a).

⁸ *Supra* n.3 (FCC App. 117a).

⁹ 60 F.C.C.2d at 863-64 (FCC App. 129a-30a).

¹⁰ *Id.* at 874-75 (FCC App. 162a-63a).

¹¹ *Id.* at 864 (FCC App. 130a).

¹² *Id.*

The Commission found that the marketplace was already providing great diversity of program service, and was responding to audience preferences for diversity within formats that often outweighed collective preferences among formats.¹³ The Commission also found that marketplace determination of radio formats "has a precious element of flexibility which no system of regulatory supervision could possibly approximate."¹⁴ Consequently, the Commission explicitly found that administrative regulation of formats under the *Atlanta* doctrine would be harmful to the public interest, not beneficial.¹⁵

The Commission also reviewed the Communications Act in light of decisions of this Court, particularly *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940):

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

Since radio broadcasters can compete only "in the domain of program formats," the Commission saw a legal necessity to leave format changes to market forces, rather than attempt to regulate them.¹⁶ This Court's interpretation of Congress' intent supported the agency's own findings that the public interest was served by format competition among radio broadcasters.

On review, the court of appeals invalidated the Commission's policy of not interfering in radio licensees' format decisions. *WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979) (*en banc*) (FCC App. 1a). The court was unconvinced by the distinction between its case-by-case approach and the Commission's comprehensive reexamination of the subject:

¹³ *Id.* at 863 (FCC App. 129a).

¹⁴ *Id.* at 864 (FCC App. 131a).

¹⁵ *Id.* (FCC App. 130a).

¹⁶ *Id.* at 860 (FCC App. 122a-123a).

We should have thought that *WEFM* represents, not a *policy*, but rather the *law* of the land as enacted by Congress and interpreted by the Court of Appeals and as it is to be administered by the Commission. . . .

WEFM was an interpretation of a statute applicable to an adjudicatory proceeding and, to this extent, was a decision in which the judicial word is final. That decision was based on an interpretation of the Communications Act.¹⁷

The court believed the Commission drastically misinterpreted the format cases to require selection of all formats by regulation rather than by market forces. The court explained that administrative oversight of format changes was intended as a supplement to the market's influence on formats, not a substitute. Commission intervention in disputes over format changes was only necessary, according to the court, "when there is strong *prima facie* evidence that the market has in fact broken down."¹⁸

The court explained that the broadcast market responds inadequately to listener preferences because broadcast revenue comes from advertising. Consequently, broadcasters "serve young adults with large discretionary incomes in preference to demographically less desirable groups like children, the elderly, or the poor."¹⁹ *WEFM* was cited to support this proposition, although *WEFM* contains no support for the proposition other than its bare statement. For example, *WEFM* refers to no empirical studies or other data about whether well-to-do young adults' musical tastes correspond—or do not correspond—to those of the elderly, the poor or any other groups.

The court also discussed the Commission's complaint that any format classification scheme was necessarily subjective, and that the distinctions drawn in previous cases were adminis-

¹⁷ 610 F.2d at 854-55 (FCC App. 32a-33a) (citations omitted).

¹⁸ *Id.* at 851 (FCC App. 24a).

¹⁹ *Id.* at 851.

tratively infeasible. The court explained that it was forced to develop its own format classifications in each case because the Commission had not classified formats comprehensively through rule making. The court advised the Commission to produce "a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational."²⁰ The court suggested that this classification scheme could use broader categories as one way to ameliorate the difficulties of implementing *WEFM*.²¹ It did not explain how broad categories could be squared with earlier cases requiring extremely narrow categories. For example, in *WEFM* the court considered the situation in Chicago where a dispute arose over whether a particular station was "classical." There the court noted that one station might play twentieth century classical music, and another might not. Both might be called "classical," but "the loss of either would unquestionably lessen diversity in the area."²²

The court of appeals was sanguine about the efficacy of administrative format regulation, because most prior format disputes had been settled rather than fully litigated.²³ The court apparently did not recognize the likelihood that the expense and delay of litigation, which prompted the need for settlement, deterred licensees' freedom of choice in selecting program content and deprived listeners of the benefits of programming selected through the marketplace rather than by government fiat.²⁴

The court gave little attention to arguments that Commission oversight of formats was contrary to the legislative history of the Communications Act,²⁵ that it violated the First Amend-

²⁰ *Id.* at 853 (FCC App. 29a) (citation omitted).

²¹ *Id.* at 854 (FCC App. 30a).

²² 506 F.2d at 264-65 n.28.

²³ 610 F.2d at 848-49, 851 (FCC App. 18a-20a, 25a).

²⁴ See *Policy Statement*, 60 F.C.C.2d at 864-65 (FCC App. 131a-133a).

²⁵ See 610 F.2d at 852 n.37 (FCC App. 26a-27a n.37).

ment as applied to broadcasting,²⁶ and that rejection of the *Policy Statement* exceeded the court's powers of review as explained in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("NCCB").

The court of appeals also criticized the Commission's rationality and impartiality in issuing the *Policy Statement*. The court was particularly aggravated by the Commission's reliance on a staff study²⁷ that the court felt had not been made available at a sufficiently early stage for adversarial comment.²⁸ The court was also unconvinced by the study's statistical analysis, finding the Commission's reasoning flawed.²⁹ The majority preferred its own "common sense" approach to formats. It acknowledged that people often preferred the announcing and tempo on one station to another with the same format. But it asserted that devotees of a particular format would, if forced to change stations, prefer to switch to a station with a similar format than one with an entirely different format.³⁰ Thus the court failed to take account of the staff study's major result: that intensity of audience preference, derived statistically from audience ratings, is approximately the same *within* various format categories as among them. The difference between two stations with "country & western" formats may be as palpable to the listening audience as the difference between two stations, one classified "talk" and the other "classical."³¹ The "common sense" of it therefore is not an accurate description of audience preferences; but the court of appeals did not explain why its intuitive view should prevail over the expert agency's.

²⁶ *Id.* at 855 (FCC App. 33a).

²⁷ The staff study is Appendix B to the *Policy Statement*, 60 F.C.C.2d at 872 (FCC App. 156a).

²⁸ 610 F.2d at 846-47, 855-56 (FCC App. 14a-17a, 34a-36a).

²⁹ *Id.* at 856-57 (FCC App. 37a).

³⁰ *Id.*

³¹ See 60 F.C.C.2d at 874-75, 881 (FCC App. 162a-163a, 170a).

Judge Tamm, joined by Judge MacKinnon, dissented on the ground that the majority was substituting its policy preference on a judgmental or predictive matter for that of the Commission, in violation of *NCCB*.³² Judge Tamm criticized the majority's "substitution" doctrine, which indicates that once the government determines that two stations have approximately the same format, either station can be presumed to satisfy the same audience preferences. Neither is deemed "unique." The government should only be concerned about preserving "unique" formats in the name of diversity. The result, Judge Tamm believed, would be government preservation of formats favored by very few listeners at the expense of many.³³ Judge Tamm also agreed with the Commission that "unique" formats could not adequately be distinguished from "non-unique" formats (a major point in the Commission's *Policy Statement*).³⁴ and that the Commission could not reliably measure audience preferences for different formats.³⁵ Judge Tamm declared:

More important than the specifics of the current debate, is the lack of deference the majority accords the commission's assessment of market conditions [The majority] mounts untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market The majority has simply substituted its views for the Commission's.³⁶

In a separate opinion, Judge Bazelon concurred on the ground that the Commission had not made its staff study available for public comment sufficiently early in the rule making below.³⁷ However, he carefully noted his general

³² 610 F.2d at 865 (FCC App. 56a).

³³ *Id.* at 862 (FCC App. 49a-50a).

³⁴ *Id.* at 862-63 (FCC App. 50a-51a).

³⁵ *Id.* at 863-64 (FCC App. 51a-53a).

³⁶ *Id.* at 864 (FCC App. 55a).

³⁷ *Id.* at 858 (FCC App. 41a).

agreement on the merits with Judge Tamm's dissent, and he criticized the majority for failing "to grapple seriously with the constitutional implications of its decision."³⁸

SUMMARY OF ARGUMENT

I.

The court of appeals' invalidation of the Commission's legislatively-determined format policy violates longstanding guidelines about the relationship between court and agency summarized most recently in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). That case, like the present one, involved a disagreement between court and agency about the nature of "diversity" under the Communications Act of 1934. In both cases the Commission's reasoned findings were amply supported in the record. Therefore, in the present case the court of appeals should have sustained the Commission's judgment that market forces are the best means of achieving diversity in radio programming, while administrative format regulation is counterproductive.

The court of appeals did not delve into the Communications Act's legislative history on the subject of formats. However, statements of Senator Wallace H. White, who played a key role in the Act's creation, show that Congress considered and rejected the categorical regulation of radio broadcasting. *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), also affirms the statutory intent that competition, not regulation, is to control radio programming. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973), explains that the Commission cannot be required to entangle itself in content decisions in the cause of public "access" to the airwaves.

The court of appeals also deviated from this Court's guidelines in evaluating a study of radio formats which was part

³⁸ *Id.* at 859 (FCC App. 42a).

of the Commission's inquiry. The court improperly discounted the results, a defect which permeates its review of the case.

II.

First Amendment doctrines in areas other than broadcasting have an important bearing on the disposition of this case. "Less drastic means" analysis is especially helpful. Congress and the Commission have chosen a number of less intrusive methods to increase diversity on radio. The Commission has created a nationwide noncommercial FM radio service specifically to provide programming that may not be in great demand in the commercial marketplace. Congress has supported this plan by providing money and other assistance. The Commission also has "multiple ownership" rules encouraging diversity of ownership in a content-neutral fashion. And reliance on the marketplace to provide diversity and innovation is itself a less drastic alternative to format control.

By concentrating heavily on the desires of various listener groups in the radio audience, the court of appeals shifted too far from the First Amendment's traditional focus of preserving speakers' rights. The First Amendment requires freedom for willing speakers in order to preserve the public's right to a variety of ideas. Broadcasting's condition of scarcity requires government to allocate frequencies; but that does not affect the constitutional premise that government is disabled from choosing which speech best serves the public interest.

Even within the narrow confines of the fairness doctrine, editorial freedom merits great deference. Beyond those boundaries, the First Amendment's recognition of potential government abuse bars official decisions that restrict the speech of some in order to promote the interests of others. This Court should therefore remove any reservations about the application of traditional First Amendment concepts to broadcasting.

ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY NULLIFIED THE COMMISSION'S POLICY FOR ACHIEVING DIVERSITY IN RADIO BROADCASTING

The court of appeals' decision in *WNCN*, overturning the Commission's painstaking conclusions on radio formats, neglects to deal with an array of case law and legislative history bearing directly on the subject. Some of these points were not urged on the court in early format decisions such as *Atlanta* and *Progressive Rock*. When the arguments were raised in later cases, the court gave them little consideration. Nevertheless, they control the disposition of this case.

A. Under *NCCB*, Policy Decisions on Diversity in Radio Broadcasting are the Province of the Commission

The confines of judicial review of agency action are long familiar. *FRC v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Moreover, the narrow scope of judicial scrutiny in broadcasting cases has been reemphasized recently in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) ("*DNC*"), and in 1978 in *NCCB*. Yet the court of appeals, for reasons that are obscure, has ignored this Court's repeated instructions and, once again, substituted its own policy judgments for the Commission's.

NCCB reiterates the standard for review of the Commission's entertainment format *Policy Statement*. *NCCB* dealt with the Commission's rule making on newspaper-broadcast cross-ownership, an area, like the present case, where Congress delegated "broad authority to the Commission to allocate broadcast licenses in the 'public interest.'" ³⁹ The Commission rationally weighed competing policies, and promulgated rules designed to encourage diversity of broadcast and newspaper ownership to the extent that such a goal did not impair "the

³⁹ 436 U.S. at 795.

best practicable [broadcast] service to the American public.'" ⁴⁰ The court of appeals overturned portions of the cross-ownership rules, substituting its judgment for the Commission's on the importance of diversity of media ownership, and the consequences that would result from a stringent policy of requiring divestiture of cross-owned broadcast and newspaper properties. This Court forcefully disagreed, holding that Congress committed "the weighing of policies under the 'public interest' standard" to the Commission, which was entitled to give greater force to the criterion of "best practicable service" than to diversity of ownership. ⁴¹ The Commission was empowered to treat diversity as a subordinate factor even though the factual record was inadequate to demonstrate the precise degree of harm to broadcast service that would be caused by not requiring across-the-board divestiture. ⁴²

In reinstating the Commission's policy in its entirety, this Court looked to whether the Commission had been arbitrary or capricious in failing to proceed rationally or in not considering the relevant factors, citing *Citizens to Preserve Overton Park v. Volpe*. ⁴³ Judicial review, while it must be "searching and careful," does not empower a court "to substitute its judgment for that of the agency." ⁴⁴ Mr. Justice Marshall explained:

We cannot say that the Commission acted irrationally in concluding that these public interest harms outweighed the potential gains that would follow from increasing diversification of ownership. ⁴⁵

The *NCCB* decision provides a striking parallel to the case at bar. After developing a full record, the Commission found facts and made a "legislative-type" judgment ⁴⁶ that leaving

⁴⁰ *Id.* at 803-04.

⁴¹ *Id.* at 810-11.

⁴² *Id.* at 813-14.

⁴³ 401 U.S. 402, 413-16 (1971).

⁴⁴ *NCCB*, 436 U.S. at 802-03.

⁴⁵ *Id.* at 805.

⁴⁶ See 436 U.S. at 814.

format decisions to broadcasters, subject to market forces, is the most effective means of achieving an acceptable level of program "diversity" under the public interest standard. The Commission reached its conclusions through a rational process—even though others might assay the facts differently—and thoroughly explained the basis for its conclusions. The difference between this kind of factual determination and adjudication is discussed in *NCCB*, in connection with policies governing local cross-ownership of newspapers and broadcast stations:

[T]o the extent that factual determinations were involved in the Commission's decision . . . they were primarily of a judgmental or predictive nature. . . . In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'⁴⁷

The court of appeals divined that the Commission can "discover" the radio audience's tastes and, using that information, weigh the detriment to the public from losing an allegedly unique format. This assessment is presumed suited to the adjudicative hearing process.⁴⁸ The court also held that the Act's provision encouraging "the larger and more effective use of radio"⁴⁹ makes "axiomatic" the preservation of formats that are preferred by a significant number of listeners. However, the court of appeals adopted this approach without benefit of any comprehensive, legislative-like agency policy.

⁴⁷ *Id.* at 813-14 (citations omitted). See K. Davis, *Administrative Law of the Seventies*, §5.01 *et seq.* (1976), for a discussion of the distinction between administrative promulgation of legislative rules and adjudication.

⁴⁸ *WEFM*, 506 F.2d at 260-61.

⁴⁹ See 47 U.S.C. §303(g).

In *WNCN*, the court of appeals sought to preserve its format doctrine as law, not policy;⁵⁰ but as Judge Tamm aptly observed: "Of course, it is both."⁵¹ Now that the Commission has thoroughly restudied this area, its legislative judgment is entitled to controlling weight under *NCCB*.

A similar parallel regarding the standard and the scope of review is found in *DNC*. The Commission had ruled that the public interest standard of the Communications Act did not mandate a right of access by non-licensees for editorial advertisements dealing with public issues. The court of appeals rejected the Commission's conclusions about implementing the basic policy of the Communications Act and the First Amendment. It held that, under the First Amendment, the Commission was required to develop a method for implementing an "abridgeable" right to present editorial advertisements.⁵² This court disagreed, holding:

that Congress has chosen to leave such questions with the Commission, to which it has given the flexibility to experiment with new ideas as changing conditions require. In this case, the Commission has decided that on balance the undesirable effects of the right of access urged by respondents would outweigh the asserted benefits. The Court of Appeals failed to give due weight to the Commission's judgment on these matters.⁵³

Deference to the Commission's legislative fact-finding and inferential reasoning is long-standing. For example, in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), the Commission's Chain Broadcasting Regulations were attacked as arbitrary and capricious. This Court declared:

⁵⁰ 610 F.2d at 854 (FCC App. 32a).

⁵¹ *Id.* at 865 n.19 (FCC App. 56a n.19).

⁵² 412 U.S. at 100.

⁵³ *Id.* at 122-23.

If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. . . . 'We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission.' Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the 'public interest' will be furthered or retarded by the . . . Regulations.⁵⁴

The Commission carefully delineated both the grounds of decision and essential facts upon which the inferences in the *Policy Statement* are based. Since the Commission's decision was not so irrational as to be arbitrary and capricious, its format policy must be sustained.⁵⁵

B. The Commission's Implementation of Diversity is Consistent With Legislative History and With Precedent

The legislative history of the Radio Act of 1927 and the Communications Act of 1934 conclusively demonstrates that

⁵⁴ *Id.* at 224.

⁵⁵ See *Dunlop v. Bachowski*, 421 U.S. 560, 572-74 (1975), discussing the standard and scope of review of the Secretary of Labor's decisions under Section 401 of the Labor-Management Reporting and Disclosure Act of 1959. In *Dunlop* the Secretary of Labor had been delegated exclusive enforcement authority to police union elections, *id.* at 568-69, much as the Commission has been delegated authority to implement the Communications Act's public interest standard. This Court held that, while the reviewing court was not authorized to substitute its own judgment for that of the Secretary, the Secretary was required to provide a statement of reasons supporting his determination. A careful delineation of the basis for discretionary action would enable an intelligent review of the administrative determination. *Id.* at 571.

Congress did not intend the Commission to engage in format regulation. Senator Wallace H. White was the draftsman of the 1927 Act. His statements in *Hearings on S. 2910 Before the Senate Interstate Commerce Committee*, 73d Cong., 2d Sess. 190-91 (1934), and earlier while a member of the House of Representatives, *Hearings on H.R. 5589 Before the House Committee on the Merchant Marine and Fisheries*, 69th Cong., 1st Sess. 39-40 (1926), show that the Communications Act includes a "very clear purpose to give no prior rights or preferential recognition to any group or to any [character of] service." *Hearings on S. 2910, supra* at 191. Senator White's comments cover what are today, in essence, radio formats.

This legislative history fortifies the statutory interpretation in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474-75 (1940):

[T]he Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.

Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.⁵⁶

Reliance on marketplace competition to create diverse radio service is the centerpiece of the Commission's format policy.⁵⁷

WNCN's contrary command ignores more than legislative history. It fails to heed the delicate First Amendment balance struck by *DNC* and *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969).

Red Lion declared a paramount right of viewers and listeners to receive "suitable access to social, political, esthetic, moral and other ideas and experiences," a right neither Congress nor the FCC could abridge.⁵⁸ *Red Lion's* treatment of the fairness doctrine and personal attack rules was based on the "long series of FCC rulings" in fairness doctrine cases,⁵⁹ though

⁵⁶ *WEFM* dismisses the language in *Sanders* by referring to *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), and *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). 506 F.2d at 267. *RCA* is a common carrier case of doubtful relevance to broadcasting. It applies here only in that it stands for the proposition that the Commission can, upon making an adequate explanation, adopt policies favoring competition in the marketplace.

Nor does *NBC* support FCC supervision of formats. The Chain Broadcasting Regulations there were directed at contractual relationships between networks and affiliates. The regulations did not directly or indirectly prevent a station from broadcasting specified content, nor force a station into particular programming. Rather, they prevented networks from using economic power to coerce stations into certain exclusive carriage relationships. They were aimed at overall economic structuring of the broadcast industry, not at the subject matter broadcast by the networks or stations. *NBC* offers no support for regulation of broadcast material.

⁵⁷ *Policy Statement*, 60 F.C.C.2d at 861 (FCC App. 124a).

⁵⁸ 395 U.S. at 390.

⁵⁹ *Id.* at 380-82.

this Court specifically did not approve all past or future fairness doctrine decisions.⁶⁰ This Court also relied on congressional approval of the fairness doctrine in the legislative history of Section 315(a), 47 U.S.C. §315(a).⁶¹ *Red Lion* thus proceeded from a legislative intent to regulate absent in *WEFM*.

The fairness doctrine issue before the Court was limited to "the obligation of presenting important public questions fairly and without bias."⁶² *Red Lion* therefore is not a broad mandate that applies with equal force to the range of a broadcaster's program discretion, including format selection. Indeed, other questions of Commission oversight of program content "would raise more serious First Amendment issues."⁶³

This caution presaged *DNC*, where Mr. Justice White's concurring opinion underscored Congress' intention "that broadcasters have wide discretion with respect to the method of compliance [with the fairness doctrine]."⁶⁴ Mr. Justice Stewart emphasized that broadcasters retained rights under the First Amendment, even though *Red Lion* indicated that the rights were "abridgeable."⁶⁵ And, in striking down a "right of access"

⁶⁰ *Id.* at 396. Cf. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) ("... Congress has restricted the Commission's ability to advance objectives associated with public access at the expense of the journalistic freedom of persons engaged in broadcasting.").

⁶¹ 395 U.S. at 380-83.

⁶² *Id.* at 383 (citation omitted). The Court was concentrating solely on the threshold fairness doctrine obligations to present controversial issues in a balanced fashion, particularly those aspects of the fairness doctrine found in the personal attack rules and the Commission's decision granting a right of reply to Fred J. Cooke to a broadcast by the Reverend Billy James Hargis.

⁶³ *Id.* at 396.

⁶⁴ 412 U.S. at 147.

⁶⁵ *Id.* at 136-38. See also Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 Tex. L. Rev. 1123, 1146 (1974), interpreting Justice Stewart's remarks as suggesting that the fairness doctrine "tested the outer limits of the first amendment's toleration of content control."

to broadcast time for controversial issues, the majority opinion highlighted the decisional significance of "the risk of an enlargement of government control over the content of broadcast discussion of public issues" inherent in a right of access.⁶⁶

Under *Red Lion* and *DNC*, broadcasters' First Amendment rights must give way only in narrowly defined situations under the fairness doctrine and personal attack rules. Beyond these confines, the First Amendment protects licensees' editorial discretion. *DNC's* interpretation of *Red Lion* leaves no room for format regulation and its attendant chilling burdens. "Assuring" access to the airwaves for all major aspects of contemporary culture, like editorial access, would require detailed bureaucratic second-guessing of program decisions.

The court of appeals attempts in *WNCN* to minimize problems inherent in administrative classification of music, discussion, sports and other radio fare.⁶⁷ Format disputes require the Commission to judge the closeness of programming alternatives, the relative social value of various formats, and the importance of each to different segments of the public. The Commission's staff study, appended to the *Policy Statement*, notes:

[G]iven the difficulties in defining a meaningful format classification coupled with a total lack of information on the relative values associated with different types of programs, we are convinced that Commission decisions in this matter will automatically lack a rational underpinning. In short, they will simply reflect the subjective and necessarily arbitrary opinions of administrative law judges.⁶⁸

The court in *WNCN* expects any format classification scheme ultimately adopted to be "imprecise at the margins."⁶⁹ But this

⁶⁶ 412 U.S. at 126.

⁶⁷ 610 F.2d at 852-54 (FCC App. 27a-32a).

⁶⁸ 60 F.C.C.2d at 875 (FCC App. 163a-164a).

⁶⁹ 610 F.2d at 853 (FCC App. 29a).

area is mostly margin. The distinctions in earlier format cases between "progressive rock" and "top forty" rock, "classical" and "fine arts," or twentieth-century and non-twentieth century classical music, prove the point. This Court has time and again cautioned against any government regulation of expression that operates without standards sufficiently clear to prevent administrative abuse. The police commissioner whose discretionary action was invalidated in *Kunz v. New York*, 340 U.S. 290 (1951), arguably relied on statutory criteria at least as objective as the distinctions that control format cases. The ordinance that lacked sufficient specificity to guide police issuance of solicitation permits in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), is hardly less subjective in its own realm than format labels. Surely the Commission was reasonable to despair of defining radio formats with the specificity necessary to pass muster.⁷⁰ The court of appeals' assurances of only "limited and deferential" review of format guidelines⁷¹ are little comfort in light of this Court's unambiguous standards.

The court of appeals offers no clue to any characteristics of the Commission's hearing process that would ameliorate the pervasive vagueness of format inquiries. The issues in format cases involve evaluation of benefit or detriment as to matters of taste. They are unresolvable in a hearing because taste is unquantifiable by administrative or judicial fiat. The agency's lack of faith in the hearing process⁷² is decisive.⁷³

⁷⁰ See 60 F.C.C.2d at 862 (FCC App. 126a-127a).

⁷¹ 610 F.2d at 852-53 (FCC App. 28a).

⁷² 60 F.C.C.2d at 865 (FCC App. 132a).

⁷³ While the Commission knows best the limits of its processes, the lack of concrete guidelines in FCC hearings is a problem of long duration. See, e.g., Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1055, 1071 (1962).

The absence of clear decisional criteria has contributed to FCC hearings that, including appeals and remands, have lasted over

(footnote continues)

C. The Commission's Staff Study was Given Insufficient Weight by the Court of Appeals

The majority opinion in *WNCN* criticizes the Commission's staff study⁷⁴ on procedural grounds⁷⁵ and disagrees with the

(Footnote continued)

decades. See, e.g., *Lamar Life Broadcasting Co.*, 46 Rad. Reg.2d (P&F) 1054 (1979), the latest chapter in a "long and tortuous" controversy that began in 1955, *id.* at 1055; *Mid-Florida Television Corporation*, 70 F.C.C.2d 281 (1978), a comparative proceeding for authority to operate a television station that has dragged on since 1957 and has yet to be concluded; *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046 (D.C. Cir. 1977), a radio comparative hearing dating from 1962, about which the court observed:

The ensuing proceeding generated no fewer than eight opinions during its twelve-year administrative lifespan. The hearing examiner, the Review Board and the Commission each favored a different applicant, and for different reasons. Although each struggled valiantly with the bevy of complex issues presented, the net result was error, and so we reverse.

Id. at 1047 (citations omitted). While these cases are egregious, they are by no means anomalous.

The Commission's criteria for evaluating incumbent licensees against new competing applicants have failed to satisfy judicial scrutiny as announced, *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972), and as applied, *Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37 (D.C. Cir. 1978). This experience creates grave doubt that Commission hearings can make the delicate discriminations among artistic qualities that are essential in radio format disputes.

Suppose that the owner of the only classical station in a market wanted to switch to an all news format. Free speech and press are obviously at stake. Could an administrative law judge decide that classical music was more in the public interest than news? Might the decision depend on whether there was already an "all news" station in the market? Suppose the existing all news station had a "liberal" editorial outlook. Could a hearing inquire into the subject? Would the case turn on whether the licensee who wanted to change formats would promise a conservative editorial policy to promote "diversity"? ⁷⁴

⁷⁴ *Policy Statement*, 60 F.C.C.2d at 872 (FCC App. 156a).

⁷⁵ *WNCN*, 610 F.2d at 846-47 (FCC App. 14a-17a).

study's ultimate conclusions.⁷⁶ The court's criticisms, however, violate this Court's instructions in *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*, 435 U.S. 519 (1978), that reviewing courts should give administrative agencies significant discretion in conducting rule makings. The court of appeals' refusal to grant the requisite discretion to the Commission is an independent basis on which *WNCN* must be overturned.

The gist of the court of appeals' complaint was that the Commission did not release the staff study until it issued the *Policy Statement*. The staff study was, of course, available for adversarial comment on reconsideration,⁷⁷ and the Commission's reconsideration order dealt specifically with objections to the study.⁷⁸ While the court of appeals declined to invalidate the *Policy Statement* on procedural grounds relating to the study,⁷⁹ "there is little doubt . . . that the ineluctable mandate of the court's decision is that the procedures afforded during the [rule making were] inadequate."⁸⁰

The court of appeals' procedural criticisms are meritless. The court implies that the Commission had an obligation to release the staff study "for adversarial testing of its data base, methodology, and conclusions" prior to issuing the *Policy Statement*.⁸¹ But the cases cited by the court do not support this conclusion. *Portland Cement Association v. Ruckelshaus*⁸² and

⁷⁶ *Id.* at 856-57 (FCC App. 36a-37a).

⁷⁷ See 47 CFR §1.429.

⁷⁸ *Changes in the Entertainment Formats of Broadcast Stations*, 66 F.C.C.2d 78, 84-85 (1977) (FCC App. 176a, 189a-192a).

⁷⁹ *WNCN*, 610 F.2d at 847 n.24 (FCC App. 17a n.24).

⁸⁰ 435 U.S. at 541-42.

⁸¹ 610 F.2d at 846 (FCC App. 14a-15a).

⁸² 486 F.2d 375 (D.C. Cir. 1973), *cert. denied sub. nom. Portland Cement Corp. v. Adm'r.*, EPA, 417 U.S. 921 (1974), *appeal after remand*, 513 F.2d 506 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1025 (1975).

*International Harvester Company v. Ruckelshaus*⁸³ require that the rule making record, compiled during the initial proceeding or upon reconsideration, be an adequate basis for the agency's ultimate decision. The voluminous comments submitted to the Commission, together with the Commission's extensive analysis and the staff study, present this firm foundation.

More significant, however, is the court of appeals' departure from the guidelines for scope of review set forth in *Vermont Yankee*, which explains that a court cannot require an agency to add procedural guarantees going beyond the requirements of the Administrative Procedure Act.⁸⁴ For example, in *Vermont Yankee* the court of appeals held that a report prepared by the Advisory Committee on Reactor Safeguards (ACRS) should have been returned to ACRS so that it could be put in terms understandable to laymen. This is closely analogous to the court's complaint in *WNCN* that the computer analysis in the staff study was not easily understood, and that the Commission should have provided information "about the study's design and data base sufficient to allow meaningful comment."⁸⁵

Vermont Yankee explains that nothing supports requiring an explanation, understandable to laymen, for each item in a decision. As in *Vermont Yankee*, the agency here was not obfuscating its findings, and the study was based on "matters of public record, on file in the Commission's public-documents room."⁸⁶ The underlying data were public and the method of analysis was comprehensible to a qualified statistician. Any interested party easily could have consulted such a person.

Various parties obviously found the conclusions in the staff study unpalatable. But the burden was upon those urging reconsideration of the *Policy Statement* to identify mistakes in

⁸³ 478 F.2d 615 (D.C. Cir. 1973).

⁸⁴ 435 U.S. at 545-48.

⁸⁵ *WNCN*, 610 F.2d at 847 (FCC App. 17a).

⁸⁶ 435 U.S. at 556.

the staff study and show their significance. Otherwise the proceedings become "a game or a forum to engage in unjustified obstructionism."⁸⁷ Unfortunately, the commenting parties seemed satisfied to complain that the Commission did not undertake an independent study of format diversity⁸⁸ and, even after additional information was put in the public file, that they could not understand the staff study.⁸⁹ The weight given by the court of appeals to these complaints demonstrates that the Commission's decision-making process was not reviewed according to the standards of *Vermont Yankee*.

II. THE FIRST AMENDMENT PROHIBITS GOVERNMENT SPECIFICATION OF RADIO FORMATS

Beyond *DNC* and *Red Lion*, constitutional doctrine of enduring vitality can and should be applied to help resolve vexing First Amendment issues in broadcast regulation. Without this additional clarification, the Commission and reviewing courts likely will continue at odds over basic directions in regulatory policy.

A. This Court's Doctrine of "Less Drastic Means" Strongly Supports the Commission's Format Policy

This Court's doctrine of "less drastic means" limits government's power to impinge upon free speech activities:

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

⁸⁷ *Id.* at 553.

⁸⁸ 610 F.2d at 846-47 (FCC App. 15a).

⁸⁹ *Id.* at 847 (FCC App. 16a-17a).

Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted).⁹⁰

In *United States v. Robel*, 389 U.S. 258 (1967), this Court held unconstitutional a section of the Subversive Activities Control Act prohibiting members of a Communist-action organization from being employed in any defense facility. Though the Act was founded on Congress' broad war power to prevent internal subversion of national defense plants, this Court declared:

When Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated The Government's interest in such a prophylactic measure is not insubstantial. But it cannot be doubted that the means chosen to implement that governmental purpose in this instance cut deeply into the right of association The inhibiting effect on the exercise of First Amendment rights is clear.

[W]hen legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms.⁹¹

"Less drastic means" analysis is necessary in the broadcast format area if regulatory policy is to be harmonized with First Amendment doctrine generally. Otherwise, extrapolation of "public interest" values will inevitably erode rights of free

⁹⁰ See also *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948).

⁹¹ 389 U.S. at 264-68 (footnotes and citations omitted); see *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

expression as the Commission and courts pursue aims which may each, in isolation, appear desirable.

WEFM held that the Commission unjustifiably relied on competition among broadcasters to produce formats that would serve the public interest, calling this "inherently inconsistent with 'secur[ing] the maximum benefits of radio to all the people of the United States,'" and inconsistent with the public interest standard.⁹² The court of appeals gave little weight to the inevitable problems of developing standards for FCC analysis of formats—especially in the area of unconstitutional vagueness—nor did it factor the First Amendment rights of broadcasters into the equation.

Contrast, for example, the approach in *WEFM* and this Court's analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976), upholding parts of the Federal Election Campaign Act amendments of 1974 and declaring others unconstitutional. In *Buckley* this Court explained the process for determining whether each part of the Federal Election Campaign Act was unconstitutional:

The markedly greater burden on basic freedoms caused by [the statute] thus cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations. Rather, the constitutionality of [the statute] turns on whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to the limitations on core First Amendment rights of political expression.⁹³

The *Buckley* analysis is a two-step process. First, the governmental interest is scrutinized to determine whether it is legitimate and, if so, to assess its importance. Second, the government's chosen means are weighed against impairment of First Amendment rights, in light of alternative means of promoting

⁹² 506 F.2d at 268.

⁹³ 424 U.S. at 44-45.

the governmental interest with a less adverse impact on free expression.⁹⁴

The goal of "diversity" in media cannot be gainsaid in the abstract. But the constitutional legitimacy of the court of appeals' format doctrine is open to serious question. *WEFM* and *WNCN* in essence require the Commission ultimately to consider substituting its programming judgment for that of licensees. As Commissioner Robinson noted, "... the obligation to carry one format necessarily entails the obligation to refrain from presenting another."⁹⁵ Official involvement of this kind is offensive to the First Amendment:

We know from experience that 'liberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper.'

Bigelow v. Virginia, 421 U.S. 809, 829 (1975), quoting 2 Z. Chafee, *Government and Mass Communications* 633 (1947). And Mr. Justice Powell observed for the Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) that:

[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects

⁹⁴ While *Buckley* also recognized that "the broadcast media pose unique and special problems not present in the traditional free speech case," *id.* at 50 n.55, traditional First Amendment analysis still must play a controlling role in broadcast regulation. See Part IIB, *infra*. In *NCCB* this Court distinguished between regulations directed at the structure of the broadcast industry—similar in form to antitrust prohibitions—and regulations that might be based on the content of broadcasts. Regulation of industry structure could be approved, while regulation whose operation "was based solely on the content of constitutionally protected speech" would fail, 436 U.S. 800-01, citing *Speiser v. Randall*, 357 U.S. 513 (1958), and *Elrod v. Burns*, 427 U.S. 347 (1976). The discussion referred to *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), noting that a completely different issue would have been posed "if 'the Commission [were] to choose among applicants upon the basis of their political, economic or social views.'" 319 U.S. at 226." *Id.*

⁹⁵ *Notice of Inquiry*, 57 F.C.C.2d at 600.

about which persons may speak and the speakers who may address a public issue. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

This view applies with the same force to selection of artistic and cultural programming as it does to informational programming;⁹⁶ broadcasting's condition of scarcity does not alter the result. In the words of Mr. Justice Stewart, concurring in *DNC*, 412 U.S. 94, 146 (1973):

And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment 'values' alone, I could not agree with the Court of Appeals. For if those 'values' mean anything, they should mean at least this: If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed by bureaucratic fiat, the choice must be for freedom.

Since there is serious doubt about the legitimacy of government format scrutiny, the search for alternative approaches is especially important. Other means are readily available. Market competition is itself the most significant "less drastic means" of achieving program diversity. Another "less drastic means" is the Commission's regulation of broadcast facilities to enhance competition. The "multiple ownership rules"⁹⁷ approved in *NCCB* seek to guide industry structure rather than the content of licensee expression. They are content neutral—precisely the opposite of the scheme in *WNCN*.

The FCC's creation of noncommercial educational radio and television services is an extremely important means to promote diversity. Public broadcasting is intended specifically to respond to market forces other than those which influence the program decisions of commercial broadcasters. Noncom-

⁹⁶ See *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *Winters v. New York*, 333 U.S. 507 (1948); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁹⁷ See 47 CFR §§73.35, 73.240, 73.636 (1976).

mercial educational services present programming which infrequently appears on commercial radio or television;⁹⁸ and as of March 31, 1980, there were 1,035 FM educational radio stations serving large and small markets across the country.⁹⁹ Congress ratified this method of program diversity in the various public broadcasting statutes enacted since 1962.¹⁰⁰ The legislative intent that diversity be an important element of public broadcasting is clear from Section 396 of the Communications Act.¹⁰¹ These elements, taken together, constitute far less drastic means of achieving diversity in radio programs than the format scrutiny approved in *WEFM*.

Any implementation of Section 309's public interest standard which affects First Amendment rights must intrude as little as possible upon protected licensee expression. To vindicate *WNCN*'s requirement for Commission involvement, it must be shown that the otherwise uninhibited "marketplace of ideas" would be severely constricted absent detailed FCC program scrutiny. The burden is on those seeking format regulation, and

⁹⁸ For an overview of the contributions of noncommercial educational ("public") radio to broadcasting diversity, see generally *A Public Trust: The Report of the Carnegie Commission on the Future of Public Broadcasting* 185 et seq. (1979).

⁹⁹ *Broadcast Station Totals for March 1980*, FCC Public Notice 30447 (April 9, 1980).

¹⁰⁰ See Educational Television Facilities Act of 1962, Pub.L.No. 87-447, 76 Stat. 64, as amended by Public Broadcasting Act of 1967, Pub.L.No. 90-129, 81 Stat. 365, 367, and by Educational Broadcasting Facilities and Telecommunications Demonstration Act of 1976, Pub.L.No. 94-309, 90 Stat. 683 (codified at 47 U.S.C. §390, et seq.). See also Sections 396(a)(1), (3), (5) and (g)(1)(A) of the Communications Act, 47 U.S.C. §396(a)(1), (3) (5), (g)(1)(A).

¹⁰¹ Congress was straightforward in its finding:

that it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence 47 U.S.C. §396(a)(5) (1978) (emphasis supplied).

such a showing is impossible. There are "less drastic means" already available for program diversity: the commercial marketplace, as structured under the "multiple ownership" rules, and noncommercial educational radio and television, which respond to programming demands outside the commercial marketplace.

B. The Rights of Broadcasters and Their Audience Are Defeated if Government Can Insist Upon Particular Expression in the Name of the Public Interest

In *WNCN* the court of appeals brushed aside constitutional objections to the format doctrine as it has developed since *Atlanta*.¹⁰² We have already shown that this was error, for the *DNC* case is a bar to the kind of content scrutiny contemplated below. Even so, the court of appeals' encouragement of such intrusive regulation—and its unwillingness to probe the free speech implications of its decisions—raises a fundamental question: to what extent have the governing doctrines of broadcast regulation undermined essential First Amendment protection for broadcast licensees?

Red Lion declared that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."¹⁰³ Was this a total shift in the First Amendment's traditional focus, so that the rights of broadcast programmers and editors are significantly devalued? Professor Benno Schmidt states the problem:

[I]t is hard to see how the chilling effect challenge to the personal attack rules can be dismissed after *Miami Herald*. The assumption of the Commission and of the Court in *Red Lion*, that such reply rights enhance diversity of expression, has been reversed. If the

¹⁰² "Suffice it to say that we found no constitutional impediment to the [*WEFM*] decision as we understood it." 610 F.2d at 855 (FCC App. 33a).

¹⁰³ 395 U.S. at 390.

personal attack rules are viewed as inhibiting expression, then they run counter to the instrumental policy of encouraging diversity of expression that *Red Lion* held to be the essence of the First Amendment as applied to broadcasting.

If such contingent access rights continue to be sustained for broadcasting, despite the chilling effect assumption of *Miami Herald*, it can only be on the theory that inhibitions of expression of the kind that the First Amendment bars for print media are permissible for radio and television. Such a theory would invite a new First Amendment approach to the electronic media. Diversity of expression for listeners and viewers (the First Amendment's dominant goal in broadcasting according to *Red Lion*) could not be the basis for continued approval. Rather, rights of reply in broadcasting would have to rest on the notion that regulation of the content of expression, including inhibition of certain types of expression, is permitted for broadcasting though it is not for print media.¹⁰⁴

In all First Amendment areas besides broadcasting, precedent holds that the right of the public to suitable ideas depends on the right of speakers freely to assert their views. Though scarcity restricts the number of speakers who can use the broadcast media, grave danger still exists if government can abridge the speech rights of those fortunate enough to hold broadcast licenses. Any governmentally administered system would, if carried but a short distance, authorize imposition of bureaucratic ideas of what is best for the broadcast audience.

Prior to *Red Lion*, censorship was defined as an abuse by government, and could not by definition apply to decisions by editors, print or broadcast. *Near v. Minnesota*, 283 U.S. 697

¹⁰⁴ B. Schmidt, *Freedom of the Press vs. Public Access* 244-45 (1976), citing *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

(1931); see *Mills v. Alabama*, 384 U.S. 214 (1966). The virtue of basing First Amendment analysis on speakers' rights was to remove government totally from selecting content. Free interchange of ideas was assured precisely because government was not allowed to determine which ones served the public interest, convenience and necessity.

Once government is charged with protecting listeners' rights to particular content, even in a condition of scarcity, the potential for abuse arises immediately. Any governmental attempt to promote one category of speech over another is a classic example of the evil at which the First Amendment is directed. Of necessity, the government's role should therefore be limited to preserving some use of the public airwaves for dealing with controversial public issues. See *Hague v. CIO*, 307 U.S. 496, 515-16 (1939). Once this is assured, further government involvement diminishes free expression instead of increasing it. The fairness doctrine consequently need not, and does not, apply to all speech protected by the First Amendment, but only to important public controversies. *National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095, 1105-06 (D.C. Cir. 1977).¹⁰⁵ Similarly, there is no need for the government to indulge in analysis of listeners' desires in order to perform the basic task of ensuring that the airwaves are devoted in part to balanced discussion of public issues. First Amendment theory still holds that the audience's long-range interest in robust expression is best served by allowing licensees the greatest possible freedom in program selection. The rights of listeners thus are protected, but not because the government is enabled to correct licensee mistakes in selecting program content.

¹⁰⁵ This provides another answer (besides "less drastic means") to Judge McGowan's question in *WEFM* as to "[p]recisely why the [regulatory] balance should be struck with entertainment programming in one pan and everything else in the other" 506 F.2d at 267. To fulfill the allocation function demanded in *Hague*, the government need only assure that use of the public airwaves includes some time devoted to the roughly balanced consideration of public issues. This can be done by concentrating solely on informational programming (news and public affairs).

The difficulty of centering First Amendment analysis on listeners' rights is well illustrated in non-broadcast cases. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court relied on the interest of society at large in having commercial information freely available for informed decisions. *Id.* at 769-70. But the analysis did not rest solely on the right of citizens to receive commercial speech:

Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases. . . . [In a recent case], we acknowledged that this Court has referred to a First Amendment right to 'receive information and ideas,' and that freedom of speech 'necessarily protects the right to receive.' And in *Procunier v. Martinez*, . . . where censorship of prison inmates' mail was under examination, we thought it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed. There are numerous other expressions to the same effect in the Court's decisions. See e.g., *Red Lion Broadcasting v. FCC*, . . . If there is a right to advertise, there is a reciprocal right to receive the advertising. . . .

425 U.S. at 757-58 (citation and footnote omitted). There is a futility to assessing First Amendment rights by primary reference to "a right to receive." The freedom of willing speakers is essential, and this symmetry applies throughout all modes of expression, including broadcasting.

Procunier v. Martinez, 416 U.S. 396 (1974), cited in *Virginia State Board*, highlights the dilemma. *Procunier* invalidated certain California prisoner mail censorship regulations:

[T]he assumption [is] that the resolution of this case requires an assessment of the extent to which prisoners may claim First Amendment freedoms. In our view this inquiry is unnecessary. . . . [W]e have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in communicating with them, mail censorship implicates more than the right of prisoners.¹⁰⁶

However, "less drastic means" analysis of prisoners' rights was used to criticize prison officials and employees,¹⁰⁷ drawing analogies to cases such as *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), protecting speakers' First Amendment rights.¹⁰⁸ Further, in setting minimal procedural safeguards for review of inmate correspondence, this Court referred to "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment. . . ."¹⁰⁹ The Court also approved a procedure mandated by a lower court for notifying an inmate of the reasons for rejecting a letter by or addressed to him.¹¹⁰ The focus on the rights of the inmates' correspondents did not exclude taking into account the rights of the prisoner-authors.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), addresses the notion that the influence of a group of speakers (specifically, corporations) might be a ground for special limitations on the right to free speech. This Court said:

¹⁰⁶ 416 U.S. at 408.

¹⁰⁷ *Id.* at 415.

¹⁰⁸ *Id.* at 409-10.

¹⁰⁹ *Id.* at 418.

¹¹⁰ *Id.* at 418-19.

We noted only recently that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .'¹¹¹

At the same time, in a footnote, the applicability of this basic tenet was reserved as to broadcasting.¹¹² The court of appeals has now shown the need to remove the reservation. It declared in *WNCN*:

Our legal judgments in earlier cases. . . were grounded in certain factual premises, namely, that there is, in the traditional sense, no free market in radio broadcasting and that, in certain circumstances, when there are persuasive indications that market allocation has broken down, the Commission has been given a useful role by Congress to play in ensuring that the benefits of radio accrue to all the people, not simply those favored by advertisers.¹¹³

Government cannot ensure that the marketplace of ideas will cater to the tastes of every, or any, particular minority. For every minority group that is served, other minorities—defined by race, religion, political or cultural disposition—can claim they are being underserved. In the *Policy Statement*, the Commission legislatively determined that it lacked the capacity to structure broadcast formats so that all segments of the audience would be served, and that such efforts would compromise First Amendment restraints. As this Court said in *DNC*: "[t]o sacrifice First Amendment protections for so speculative a gain is not warranted, and it was well within the Commission's discretion to construe the Act so as to avoid such a result."¹¹⁴

¹¹¹ 435 U.S. at 790-91, quoting *Buckley v. Valeo*, 424 U.S. at 48-49.

¹¹² *Id.* n.30.

¹¹³ 610 F.2d at 855 (FCC App. 34a).

¹¹⁴ 412 U.S. at 127 (footnote omitted).

Most broadcasters design their programming to attract the maximum audience, taking account of the market structure existing as a result of competitors' formats. Certainly these efforts are made in part to secure greater advertising revenue. But maximizing audience also maximizes the impact of a broadcaster's editorials, news and public affairs, as well as drama or other entertainment. It increases the public's exposure to ideas expressed in music, or humor, including the licensee's own expression and that of writers or artists whose views the licensee seeks to give wide exposure. As a conduit for others' expression, the licensee is no less entitled to protection under the First Amendment than a newspaper owner who publishes the work of popular columnists whose articles increase circulation. See generally *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

Indeed, the selection of a format is itself a form of expression. The individual music, news, and talk programs may be the expressions of others, but the blending of elements into the whole which particularizes a station represents the expression of the licensee. Just as the parts have aesthetic value or convey ideas, so the whole is an artistic and intellectual statement. It is a form of expression protected by the First Amendment just as surely as an anthology is the expression of the editor as well as of the individual artists whose works are collected, or as the selection of news stories for publication constitutes an expression by the publisher of a newspaper. The fact that each hopes to appeal to an audience for commercial reasons does not attenuate that protection. See *Bigelow v. Virginia*, 421 U.S. 809 (1975). Freedom of expression cannot exist if the government is allowed to sift through these motives, making judgments on ideas and aesthetics, simply because some degree of commercialism prompted their publication.

The most significant price for government format regulation would be paid by members of the public who desire programs other than those preferred by government officials.

CONCLUSION

The judgment of the court of appeals should be reversed
and the Commission's *Policy Statement* reinstated.

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June 6, 1980

APPENDIX**CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED**

The First Amendment to the Constitution of the United States provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Sections 309(a) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(a) and (e), provide:

"(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the ground and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the

Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission "

Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §310(d), provides:

"(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. §326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

Sections 396(a)(1), (3) and (5), and (g)(1)(A) of the Communications Act of 1934, as amended, 47 U.S.C. §396(a)(1), (3) and (5), and (g)(1)(A), provide:

"(a) The Congress hereby finds and declares that—

(1) it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes;

(3) expansion and development of public telecommunications and of diversity of its programming depend on freedom, imagination, and initiative on both local and national levels;

(5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence. . . .

(g)(1) In order to achieve the objectives and to carry out the purposes of this subpart, as set out in subsection (a), the Corporation is authorized to—

(A) facilitate the full development of public telecommunications in which programs of high quality, diversity, creativity, excellence, and innovation, which are obtained from diverse sources, will be made available to public telecommunications entities, with strict adherence to objectivity and balance in all programs or series of programs of a controversial nature. . . ."

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

Nos. 79-824, 79-825,
79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, INSILCO BROADCASTING
CORP., *et al.*, AMERICAN BROADCASTING
COMPANIES, INC., *et al.*, NATIONAL ASSOCIATION
OF BROADCASTERS, *et al.*,

Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,

Respondents.

MOTION OF THE WASHINGTON LEGAL
FOUNDATION FOR LEAVE TO FILE A
BRIEF *AMICUS CURIAE* AND BRIEF OF
AMICUS CURIAE, THE WASHINGTON
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(i)

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OCTOBER TERM, 1979

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MOTION OF THE WASHINGTON LEGAL
FOUNDATION FOR LEAVE TO FILE A
BRIEF *AMICUS CURIAE*

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceedings. Consent to the filing of the brief has been obtained from counsel for petitioners. However, consent has been refused by counsel for respondents.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for

(ii)

the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of the broadcasting industry and the general public in minimizing government interference with the ability of broadcast licensees to change programming formats. Format changes are expressions of speech which are protected by the First Amendment to the Constitution.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. None of the litigating parties is primarily focusing upon general issues of the proper administrative and constitutional role of the Federal Communications Commission concerning radio format changes. WLF's sole concern in these cases is to support the petitioners' efforts to limit the FCC's involvement with format changes so as to maximize free competition and free enterprise in the electronic media.

The broadcast industry is one of the most powerful and influential economic centers in this country. The programs aired by radio and television affect nearly all of the population. The prospect of increased government regulation of the media, if the Court of Appeals is upheld, poses an alarming threat to First Amendment rights. The loss of a particular radio format may be great for elements of a community. Yet, this does not justify massive federal interference with basic programming

(iii)

decisions by broadcasters. The public interest requires strict adherence to constitutional principles by agencies of the government.

Accordingly, the Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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June 5, 1980

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

Nos. 79-824, 79-825,
79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, INSILCO BROAD-
CASTING CORP., *et al.*, AMERICAN BROADCASTING
COMPANIES, INC., *et al.*, NATIONAL ASSOCIATION
OF BROADCASTERS, *et al.*,

Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,

Respondents.

BRIEF OF *AMICUS CURIAE*, THE
WASHINGTON LEGAL FOUNDATION, INC.

INTERESTS OF *AMICUS CURIAE*, THE
WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of the broadcasting industry and the general public in minimizing government interference with the ability of broadcast licensees to change programming formats. Format changes are expressions of speech which are protected by the First Amendment to the Constitution.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. None of the litigating parties is primarily focusing upon general issues of the proper administrative and constitutional role of the Federal Communications Commission concerning radio format changes. WLF's sole concern in these cases is to support the petitioner's efforts to limit the FCC's involvement with format changes so as to maximize free competition and free enterprise in the electronic media.

The broadcast industry is one of the most powerful and influential economic centers in this country. The programs aired by radio and television affect nearly all of the population. The prospect of increased government regulation of the media, if the Court of Appeals is upheld, poses an alarming threat to First Amendment rights. The loss of a particular radio format may be great for elements of a community. Yet, this does not justify massive federal interference with basic programming decisions by broadcasters. The public interest requires strict adherence to constitutional principles by agencies of the government.

STATEMENT OF THE CASE

These consolidated cases revolve around the issue of the authority of the FCC to regulate changes in program format by individual radio station licensees. This issue has led, over the past decade, to divergent viewpoints by the activist United States Court of Appeals for the District of Columbia Circuit and by the Federal Communications Commission.

Format changes are problems which are generally confined to radio.¹ Formats are specialized forms of programming which are adopted by licensees as a means to allure and keep loyal listeners. The success of a radio format will translate into higher advertising rates and station revenues.

Radio formats can be as particular as a licensee desires. A radio station may specialize, for example, in classical or jazz music. Stations often subdivide rock music into numerous sub-categories such as progressive or Top-40, thereby particularizing their listening audiences further. Formats may be informational as well as entertaining, e.g. religious, all-news, or all-talk-show programs.²

Licensees have traditionally exercised great freedom in format selection and change, both during the three

¹Television stations normally have a "general" format with programs appealing to a wide range of audiences. However, there can be exceptions: a Spanish language UHF (Ultra High Frequency) station.

²Format specialization is a byproduct of the development of television. Television stations siphoned off most general listening programs and their audiences. Radio licensees responded with narrow formats to appeal to particular segments of the population. *Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636, 57,646 (1979).

year license period and when licensees are assigned to new owners.³

It is this freedom which has been increasingly questioned by the Court of Appeals.⁴ That court, in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974), stated that the FCC, before permitting the assignment of a license involving a format change, would have to hold public hearings upon certain conditions.

The FCC, in response, ordered an inquiry into the problem of format change regulation.⁵ The Commission promulgated a policy statement, *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976), *reconsideration denied*, 66 F.C.C.2d 78 (1977), which reaffirmed its commitment to let formats change according to marketplace considerations. The Commission cited statutory and constitutional impediments to format regulation as well as impracticality of application of these regulations.

The Commission policy statement was challenged and subsequently overturned by the Court of Appeals on June 29, 1979. Petitions for certiorari were filed in this Court on November 26, 1979. Certiorari was granted by this Court on February 25, 1980.

³E. Roult, J. McGrath, & F. Weiss, *the Radio Format Conundrum*, p. 1 (1978).

⁴See *Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970); *Hartford Communications Comm. v. FCC*, 467 F.2d 408 (D.C. Cir. 1972); *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974).

⁵*Notice of Inquiry, Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580 (1976).

ARGUMENT

I.

THE COURT OF APPEALS DOES NOT HAVE THE POWER TO SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE FEDERAL COMMUNICATIONS COMMISSION WHERE POLICY MATTERS INVOLVING AGENCY EXPERTISE ARE CONCERNED.

The Federal Communications Commission has been charged by Congress to regulate the use of the airwaves by broadcasters. Regulation has been considered necessary due to the nature of the broadcasting medium. The scarcity of allowable frequencies compels government allocation to prevent a "cacaphony of competing voices." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 368, 376 (1969).

As a consequence, some agency intervention in broadcasting matters has occurred with the sanction of the courts. However, regulations concerning public interest obligations of broadcasters, e.g., fairness doctrine, or the political equal time rule, are related to procedural and not contextual requirements. Commission power over substantive content programming has been exerted only to prohibit the broadcast of obscene language; language not protected by the First Amendment. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The FCC has been understandably reluctant to get itself involved with format regulation. This reluctance is a natural outgrowth of the Commission's over forty-year experience with the workings of the broadcasting industry. After careful consideration, the FCC has determined that "our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters

that Congress meant to leave to private discretion." 60 F.C.C.2d at 865.

The Commission emphasizes that:

Although it is recognized that competition will result in some degree of format duplication, we firmly believe that continued reliance on forces in the marketplace provides a positive benefit to the public by allowing listeners to give some means of expressing "whether their preferences for diversity *within* a given format outweighs the desire for diversity *among different* formats." 60 F.C.C.2d at 863, and also by providing a competitive spur which assures that stations offering popular format types will not become indifferent to the tastes of their listeners.

66 F.C.C.2d at 81.

The business judgment of the licensee is given much deference by the agency and rightfully so.⁶ It is this independent decision by the broadcaster to devise a particular format for his station which leads to marketplace diversity. The Commission, charged by Congress to make decisions in the public interest,⁷ examines the

⁶See Note, *Listeners' Rights: Public Intervention in Radio Format Changes*, 49 St. John's L. Rev. 714, 739 (1975); 53 Tex. L. Rev. 1099, 1100-01 (1975).

⁷Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), provides:

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

particular format choice made in a license application or license renewal form and decides its public merit. Agency notification is required only of substantial format changes.⁸ *Amicus* urges that this minimal intervention by the FCC be considered sufficient to ensure programming diversity.

In large radio markets, radio stations have "naturally" evolved diverse programming without extended federal involvement. 66 F.C.C.2d at 80. Yet, the Court of Appeals would have the FCC hold hearings if a license assignment would affect diversity. This is in spite of the fact that a diverse market can be very difficult to administer.

The Commission has recognized that enormous difficulties would be encountered in enforcing format regulations. Formal definitions of diversity and of broadcast programming categories would have to be devised. Needless to say, defining a concept as dynamic and changing as "progressive rock" could lead to highly arbitrary and subjective terminology. Formats evolve with time. In order to truly monitor such change would necessitate "a comprehensive, discriminating and continuing state surveillance." *Lemon v. Kurtzman*, 401 U.S. 602, 619-20 (1971). Administrative costs of monitoring or conducting formal change hearings could be significant, both in money and time for all parties involved. 60 F.C.C.2d at 861-65.

Another Commission concern relates to the fact that the Court of Appeals mandates government intervention when a "unique" station format is to be abandoned, 60 F.C.C.2d at 863-64, 873-75. However, guidelines for

⁸See Notes, *Federal Regulation of Radio Broadcasting*, 28 Rutgers L. Rev. 966, 968-69 (1975).

determining a unique programming format, for measuring listener format preferences or for the intensity of those preferences may not be quantifiable. *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 862-64 (D.C. Cir. 1979) (Tamm, C.J., dissenting).

Former FCC Commissioner Glen O. Robinson characterized the difficulty of measuring a unique format:

What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. . . . Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would. Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" and that citizens' groups (and, alas, appellate judges) call format. It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved. At that thought the mind swims and the heart sinks.

57 F.C.C.2d at 594-95 (Robinson, concurring opinion) (footnotes omitted).

Notwithstanding the various faults the FCC has noted exist with format regulation, the D.C. Circuit has insisted on the Commission applying format regulation in particular circumstances. The Commission must, according to the court, examine any potential loss of diversity when considering a license assignment. The Commission

substantial number of people voice "significant public grumbling" over the proposed license change. The FCC must decide if an adequate format substitute exists in the licensee's service area (which consists of the licensee's broadcasting home and nearby places regularly served by the station). Finally, the agency must determine if the "endangered" program format is "financially unviable," regardless of station management. If any of the above issues occurs, involving "substantial questions of fact material to the public interest," the FCC must order an evidentiary hearing. The hearing is a prerequisite to the agency assignment decision. *WNCN Listeners Guild v. FCC*, 610 F.2d at 842-43.

Amicus stresses that the FCC's studied decision not to get involved with radio format regulation should not be lightly disregarded by reviewing federal courts. Commission policy decisions or actions by administrative agencies have traditionally been given respect by the courts.

In 1940, Justice Frankfurter warned that:

[C]ourts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. . . ." Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies.

FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 146 (1940).

Soon after, the Supreme Court confirmed the broad public interest powers of the Commission to regulate radio. However, Commission powers did not extend to selecting license applicants on a capricious basis. *National Broadcasting Co. v. United States*, 319 U.S. 190, 217, 226 (1943).

Courts have found that administrative agencies like the FCC often are more effective at decision-making due to their "specialization, . . . insight gained through experience, and . . . more flexible procedure." *Far East Conference v. United States*, 342 U.S. 570, 575 (1952).⁹ A reviewing court does not decide the wisdom of a particular agency action but only if it is arbitrary, capricious or an abuse of administrative discretion.¹⁰ The First Circuit Court of Appeals has acknowledged that:

We have no license to regulate broadcasting nor to impose our private views of the public welfare. What we must do is determine whether the Commission is acting within its lawful regulatory authority. In so doing, we shall first consider whether the Commission, judged in terms of its own procedures and precedents, past and present, has acted rationally and properly. Thereafter, we shall

⁹See *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953); *Nat'l Ass'n of Independent Television Producers & Distributors*, 516 F.2d 526, 536 (2d Cir. 1975).

¹⁰See e.g., *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968); *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d at 926; *Lakewood Broadcasting Service Inc. v. FCC*, 478 F.2d at 922; *S. Terminal Corp. v. EPA*, 504 F.2d 646, 655-56 (1st Cir. 1974); *Pub. Interest Research Group v. FCC*, 522 F.2d 1060, 1064 (1st Cir. 1975); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 246 (2d Cir. 1977); *Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978).

consider its actions in terms of statutory and constitutional law.

Public Interest Research Group v. FCC, 522 F.2d at 1064.

Amicus urges that judicial restraint be applied concerning the FCC's desire to stay out of format regulation. The Commission has reached its present attitude after years of examining broadcast activities, as well as through regulatory proceedings. Comments from broadcasters, public interest organizations and the general public were solicited and received by the agency as a result of its *Notice of Inquiry*. The Commission compiled a statistical analysis to study problems of format regulation. It therefore is apparent that the agency's opinions are not arbitrary or capricious and should be respected and upheld by the courts.

The D.C. Circuit should not be allowed to substitute its own views for that of the Federal Communications Commission in matters relating to policy-making. The Commission has initiated proceedings towards a general deregulation of radio rules.¹¹ This would terminate most FCC regulations over the amount of informational and advertising material to be aired by radio licensees. The refusal of the Commission to involve itself with format regulation reflects a deregulatory, pro-marketplace attitude. An adverse decision in this case might well jeopardize radio deregulation.¹²

¹¹*Inquiry & Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636 (1979).

¹²Critics of deregulation are aware of this. *Deregulation of Radio: Denying Motion for Extension of Time*, 45 Fed. Reg. 20985 (1980).

must take into its public interest decisions whether a

II.

THE FEDERAL COMMUNICATIONS COMMISSION IS NOT AUTHORIZED, EITHER BY THE CONSTI- TUTION OR BY STATUTE, TO INVOLVE ITSELF WITH PROGRAM FORMAT CHANGES.

Amicus has previously denoted that the Court of Appeals for the District of Columbia Circuit does not have the ability to "second-guess" Federal Communications Commission decisions which are not arbitrary or unlawful. In addition, even if the FCC enthusiastically supported format regulation, the First Amendment and the Communications Act of 1934 would bar such enforcement.

A. The First Amendment to the United States Constitution forbids government involvement with broadcast format decision-making.

Mandating government intervention in license assignments or renewals when a "unique" programming format is threatened naturally involves the First Amendment to the United States Constitution.¹³ The FCC is constitutionally empowered to "impose reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community." *Henry v. FCC*, 302 F.2d 191, 194 (D.C. Cir. 1962).

However, format regulation would not constitute a "reasonable restriction" upon licensees. The FCC has astutely observed that, in the course of format change proceedings, an entire proposed programming alternation

¹³The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

could be rejected by the Commission. A consequence of this would be ordering the licensee, in order to promote "diversity," to provide a particular format even if it is not what he originally intended. 66 F.C.C.2d at 83. Massive federal intervention in radio operations could well ensue.

Format change regulation could have a "chilling effect" on the broadcast industry. Licensees would be afraid of instituting experimental programming changes for fear of being "locked in" the format by the Commission. Economic considerations would become more important to the broadcaster. He would be more apt to choose programming pleasing to an aural majority of listeners in order to have a firm financial position in case future format changes were to be vetoed by the Commission or challenged in the courts. Format regulation could well infringe upon the broadcaster's editorial judgment and his freedom of speech.¹⁴

Freedom of speech is a fundamental right guaranteed to Americans through the First Amendment. Justice Brennan has opined that:

These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). The Justice has stressed that "[p]recision of regulation must be the touchstone in an area so closely touching

¹⁴See Notes, *Federal Regulation of Radio Broadcasting*, 28 Rutgers L. Rev. 966, 978-79 (1975).

our most precious freedoms." *Id.* at 438. Therefore, the Court should apply the strict scrutiny standard of judicial review to the concept of format change regulation. Unless some compelling governmental interest is involved or the relevant speech not constitutionally protected, any infringing statute or regulation will be invalidated. *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1111 (D.C. Cir. 1978).¹⁵

Courts have noted that the First Amendment's role in broadcasting is to "preserve an uninhibited marketplace of ideas." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As a result, the FCC cannot "take from the licensee the ultimate control, and the ultimate responsibility as well, for the actual content of particular programs within the broad categories promulgated to serve the public interest." *National Association of Independent Television Producers & Distributors*, 516 F.2d at 538. A broadcaster, then, has the right to seek the assistance of the First Amendment as a defense against government attempts to limit independent decision-making. *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1110. The Supreme Court has declared that the heart of any unconstitutional governmental censorship is "content control." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). *Amicus* stresses that any format change regulation by the FCC would constitute unlawful content control of licensee programming.

¹⁵See also *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 604 (1967); *United States v. Robel*, 389 U.S. 258, 263 (1967).

Moreover, no lawful rationale for non-application of the First Amendment has been presented in the instant case. The Commission and the Federal Government lack a compelling interest to enforce format regulation. Nor does the nature of the speech concerned in this case, i.e., music and other forms of informational and entertainment programming, fall within non-protected language. None of the formats concerned are obscene. The fact that money is expended to finance commercial radio programs, e.g., by advertising, does not eliminate First Amendment guardianship.¹⁶

Therefore, *Amicus* believes that any attempt by the Commission to involve itself with format control, as required by the Court of Appeals, would contravene the First Amendment's freedom of speech guarantee and not be in the public interest.

B. The Communications Act of 1934 forbids government involvement with broadcast format decision-making.

Amicus finds that even if format regulation by the FCC did not offend the First Amendment, it would still violate the Commission's statutory authority, the Communications Act of 1934.

The Supreme Court has observed that the goal of the Act "was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co. v. United States*, 319 U.S. at 217. The Act

¹⁶The First Amendment protections given commercial speech are enunciated in such cases as: *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *Va. State Bd. of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363-64, rehearing denied, 434 U.S. 881 (1977).

established the FCC and gave it significant authority to regulate radio and other communications forms in the public interest.¹⁷ Yet, the Act does not provide for unlimited power. The Commission, for example, is expressly forbidden to engage in censorship.¹⁸

Amicus suggests that allowing format regulation would permit a form of censorship by the Commission. The FCC, in the name of "diversity," could prohibit a renewing or assigned licensee from broadcasting particular formats. This would interfere with free speech within the meaning of the statute.

The Supreme Court has considered the relationship between government intervention with broadcasting and the Communications Act. Speaking for the Court, Chief Justice Burger has declared:

Long before the impact and potential of the medium [radio] was realized, Congress opted for a system of private broadcasters licensed and regulated by Government. The legislative history suggests that this choice was influenced not only by traditional attitudes toward private enterprise, but by a desire to maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role. The historic aversion to censorship led Congress to enact § 326 of the Act. . . . Congress pointedly refrained from divesting broadcasters of their control over the selection of voices;

¹⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380.

¹⁸ Section 326 of the Act provides that:

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

§ 3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.

Columbia Broadcasting System Inc. v. Democratic National Committee, 412 U.S. 94, 116 (1973) (footnote omitted).¹⁹

Amicus finds that the definition of journalistic independence must surely include judgment over choice of programming formats. This choice is analogous to newspaper editors' decisions as to what features their newspapers will carry and how large they will be. The electronic marketplace is not "fair game" for the Commission or Court of Appeals. In Short, "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." *FCC v. Sanders Brothers Radio Station*, 309 U.S. at 475.

¹⁹ Section 3(h) of the Act provides that:

"Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

The rejection of broadcasters as common carriers is confirmed in a number of cases, e.g., *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

CONCLUSION

The Federal Communications Commission has determined that the agency should not be involved with regulating changes in programming formats by station licensees at either the time for license renewal or when a license is assigned to new owners. This policy has been modified by the United States Court of Appeals for the D.C. Circuit. The court requires agency action, including hearings, if the elimination of a particular format would result in a loss of diversity in a license service area.

The Court of Appeals, however, has neither the expertise nor authority to impose its judgment on format regulation upon the FCC. The Commission's policy findings had a reasonable basis in agency expertise and were not arbitrary or capricious.

Even assuming that the Court of Appeals could mandate Commission format regulation, such regulation would infringe the First Amendment's protection of freedom of speech. It would also violate the Communications Act of 1934's provision against governmental censorship.

Freedom of expression for broadcasters within a competitive electronic marketplace is a goal desired by much of the public, government and broadcasting industry. By reversing the Court of Appeals' decision, this Court is in a position to further diversity of ideas without harmful government interference.

Respectfully submitted,

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June 5, 1980

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-824, 79-825, 79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,
v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

JOINT BRIEF FOR PETITIONERS
AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC., METROMEDIA, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS,
NATIONAL BROADCASTING COMPANY, INC.,
NATIONAL RADIO BROADCASTERS ASSOCIATION,
WBNS TV INC. AND RADIOHIO INCORPORATED

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 610 F.2d 838 and appears as Appendix A of the petition for writ of certiorari of the Federal Communications Commission and the United States. The opinions of the Federal Communications Commission are reported at 60 F.C.C.2d 858 (1976) and 66 F.C.C.2d 78

(1977) and appear as Appendices D and E, respectively, of the Government's petition.*

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. FCC App. 57a. On September 21, 1979, the time for filing petitions for a writ of certiorari was extended to November 26, 1979. The petitions for writs of certiorari were filed on that date, and were granted by this Court by orders entered on March 3, 1980. Jt. App. 95-98. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 3(h), 303(g), 307(d), 309(a), 309(e), 310(d), and 326 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(h), 303(g), 307(d), 309(a), 309(e), 310(d), and 326. These constitutional and statutory provisions are set forth in an Appendix to this brief.

QUESTIONS PRESENTED

Following a comprehensive policy and fact-finding inquiry, the Federal Communications Commission concluded that public interest goals of the Communications Act of 1934 and of the First Amendment would be best served by adhering to a long-standing regulatory approach that relies upon broadcaster judgments and marketplace competition to assure responsiveness to listeners' needs. The court of appeals disagreed and required the Commission to regulate changes in radio formats. The questions presented are:

* References to the Appendix to the Government's petition for writ of certiorari will be cited herein as "FCC App. —." References to the Joint Appendix in these consolidated cases will be cited herein as "Jt. App. —."

1. Whether the Communications Act of 1934 requires the FCC to regulate program format changes when the FCC specifically determined that such regulation would be contrary to the public interest.
2. Whether the First Amendment to the Constitution and Section 326 of the Communications Act bar government dictation of radio formats.

STATEMENT OF THE CASE

This case presents important questions concerning the authority of the government to regulate program formats of radio broadcast stations, and the proper role of the court of appeals in reviewing an agency determination not to engage in such regulation.

The term "program format" refers to the overall pattern of material broadcast by a radio station. Formats vary and, more importantly, are perceived by the listening audience to vary, not only by broad musical categories such as "rock" or "classical," but by many sub-categories within musical types, as well as by pace, timing, and on-air personalities. These variations make any categorization of an individual format a generalized, imprecise and somewhat arbitrary description of the station's actual programming. No format is limited to music or other entertainment programming; all include news, information, and "talk." Some formats consist only of the latter type of material. The choice of program format, therefore, involves not only entertainment, but also news and other journalistic expression.

In this case, the court of appeals reversed a policy determination of the Federal Communications Commission ("FCC" or "Commission")—a policy consistent with more than forty years of agency practice—that government should not intrude on the discretion of broadcast licensees to initiate and change program formats.

The Role of Specialized Formats

Over the last fifty years, the number of radio stations has dramatically increased. In 1934, there were only 583 operating radio stations—all AM¹—fewer than the number of television stations now on the air. Today, there are 8,761 operating AM and FM radio stations,² and most metropolitan areas are served by a vast array of stations.³

The development of television and the increase in the number of radio stations led most radio broadcasters to move away from general-interest formats towards specialized audio services. The result of this development has been a fragmentation of the listening audience.⁴ The success of specialized radio in satisfying public desires is shown by the fact that the audiences of general-interest stations have declined while the overall radio audience, increasingly divided among a variety of specialized stations, has dramatically increased.⁵

¹ *Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636, 57,646 (1979).

² FCC Public Notice, Broadcast Station Totals for March 1980 (April 9, 1980).

³ 137 markets are served by ten or more radio stations. *Deregulation of Radio*, 44 Fed. Reg. at 57,646.

⁴ For example, in 1967, three stations, of which two had general service formats, accounted for 79% of the audience share in Tulsa. By 1975, six stations, five of which featured specialized formats, had the same aggregate share. These formats—difficult to define with precision—included “country,” “AM hit music,” “country rock,” and “standard songs.” “A Report on Radio Station Format Changes” prepared by Robert E. Henabery to accompany comments of American Broadcasting Companies, Inc. submitted to the Federal Communications Commission in Docket No. 20682 [hereinafter “Henabery Report”], Jt. App. 39, 52, 69, 71, 72.

⁵ Henabery Report, Jt. App. 44-45.

No one format is consistently attractive to listeners. In many markets, one or another “pop” or “rock” station is popular. In others, the leading station may feature “beautiful music” or “all-news.”⁶ The process of program format selection is a dynamic one. Radio stations constantly modify formats or try other formats. As tastes and interests change, as competitors adopt new programming approaches, as formats succeed and fail, stations alter their formats, sometimes subtly by stylistic and minor program changes, sometimes radically.⁷ For instance, a “soft rock” music station might become wholly “disco” as that music becomes popular,⁸ or a “beautiful music” station might change to “all-news” in an effort to attract a larger audience. On the other hand, a “soft rock” or “beautiful music” station might simply alter its mix of “talk” and music. The general terminology used to describe radio formats may thus reveal little about a station’s actual programming mix.

⁶ In five of the nation’s 25 largest radio markets, the leading station features some form of “news” or “talk.” In nine of these markets, the most listened to station has some type of a “pop/adult” format, and “beautiful music” stations lead in five more markets. *Radio & Records Ratings Report*, 1979, Vol. 2 (based on ARBITRON data for October/November 1979).

⁷ “[O]nce the decision has been made to program contemporary music, ethnic music, all-news, all-talk, or adult music, the format may, and likely will, be subjected to a dozen subtle or obvious shifts and adjustments.” E. ROUTH, J. McGRATH & F. WEISS, *THE RADIO FORMAT CONUNDRUM* 1 (1978).

⁸ As a result of making this change, WKTU(FM) in New York City moved from a 1.4 market share in July-August 1978 to an 11.3 share in October-November 1978, becoming the leading station in the market. *Broadcasting*, January 22, 1979, at p. 32.

Moreover, the radio audience often perceives significant differences between apparently similar formats so that seemingly minor variations can have a substantial impact on attractiveness to listeners.⁹ This also makes it difficult to distinguish among station formats. The process of choosing the content, pace, personality, and style of a station is at the core of radio decisionmaking. This is the very process which the court of appeals here has demanded that the FCC regulate.

The Development of Format Regulation

Prior to 1969, the Commission refrained from interfering in licensee choice of program formats.¹⁰ The first format case to reach the court of appeals was *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) [hereinafter *Atlanta*]. In *Atlanta*, the proposed transferee of two Atlanta stations desired to change their formats from classical music to a blend of "popular favorites, Broadway hits, musical standards, and light classics." The Commission held that since the transferee had shown that its proposed format would serve the public interest, "the matter is one for judgment of the broadcaster and the Commission . . . cannot properly insist that the prior format must be retained."¹¹

⁹ "Radio Station Format Changes, Diversity, and Consumer Welfare," submitted as Appendix 1 to the Comments of National Association of Broadcasters, Jt. App. 23, 31-32 [hereinafter "Owen Study"].

¹⁰ See, e.g., *En Banc Programming Report*, 44 F.C.C. 2303, 2308-09 (1960); *Bay Radio, Inc.*, 22 F.C.C. 1350, 1364 (1957).

¹¹ *Glenkaren Associates, Inc.*, 14 P&F Radio Reg.2d 104, 105-06 (1968), *reconsideration denied*, 19 F.C.C.2d 13 (1969), *rev'd sub nom. Atlanta*.

The court of appeals reversed the Commission's decision, beginning the development of the court's format doctrine. Because there was public opposition to the format change, the court held that the Commission should have conducted a hearing to determine whether the transfer would serve the public interest. In such a hearing the Commission should consider whether the existing classical music format was "unique" in the service area, whether it was financially viable, and whether it was the preference of a significant portion of the listening audience. Relying on the general "public interest" standard of Section 310(b) (now § 310(d), 47 U.S.C. § 310(d)) of the Communications Act, the court ruled that where numerous channels are available in an area, the public interest standard requires the Commission to ensure that "all major aspects of contemporary culture . . . be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." 436 F.2d at 269. In response to an argument that format regulation would make the FCC a "national arbiter of taste," the court stated:

"[t]he Commission is not dictating tastes when it seeks to discover what they presently are, and then to consider what assignment of channels is feasible and fair in terms of their gratification."¹²

The Commission attempted to implement the court's *Atlanta* decision, but its efforts to minimize interference with licensee discretion were rebuffed by the court of appeals. In *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973) [hereinafter *Progressive Rock*], the buyer proposed to change a "golden oldies" format to "middle of the road." There was no objection to the proposed change. While the assignment application was pending, the seller experimented

¹² 436 F.2d at 272 n.7.

with a "progressive rock" format, which proved successful. Only after the assignment was approved did a citizens group protest the change to "middle of the road" from "progressive rock," filing a petition for reconsideration which the Commission denied. The FCC found that requiring the buyer to retain a format which had only been on the air five months, and which had been initiated after the purchase of the station was negotiated, would unacceptably abridge licensee programming discretion.¹³

On review, the court criticized the Commission's narrow reading of the *Atlanta* decision.¹⁴ Basing its decision solely on its disagreement with the Commission as to the nature of the "public interest," the court concluded that, since a "significant" portion of the audience had complained, a hearing was required to resolve disputes over the uniqueness and financial viability¹⁵ of the progressive rock format. 478 F.2d at 933.¹⁶

¹³ *Twin States Broadcasting, Inc.*, 35 F.C.C.2d 969 (1972), *rev'd sub nom. Progressive Rock*.

¹⁴ 478 F.2d at 930.

¹⁵ The court stressed that whether the licensee had suffered losses under the previous format was not the question that the Commission must address. Rather, it was required to determine whether that format *could be* economically viable. Only if it could be shown that under no circumstances could the station make a profit using the format would the Commission be permitted to approve the format change without a hearing. 478 F.2d at 931-32.

¹⁶ In *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973), finding that the Commission had rendered a "painstakingly thorough decision," 478 F.2d at 922, the court did affirm Commission approval of an assignment which resulted in a change from an "all-news" format to "country and western." In a cursory analysis, the court concluded that the Commission's findings that the "all-news"

In neither *Atlanta* nor *Progressive Rock* did the court of appeals cite any legislative history or past FCC or judicial decisions to support its interpretation of the public interest standard. Nor, apparently, did it consider the serious First Amendment implications of regulation in this sensitive area.

The WEFM Decision

The format controversy took on new significance in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*) [hereinafter *WEFM*], a case involving the assignment of a Chicago radio station. The assignee of WEFM had proposed a "contemporary" format in place of the classical music the station had featured. The Commission approved the assignment on the grounds that two other stations in the area provided similar classical music service and that substantial operating losses had been incurred under the existing format.¹⁷ Six Commissioners expressed doubts concerning government interference with licensee choice of radio formats. They suggested that the discretion the Commission had traditionally afforded broadcasters provided an essential flexibility—allowing development of new formats and the discarding of formats which had lost popular appeal.¹⁸

In vacating the FCC's decision, the court of appeals found that the Commission could not rely on the programming of the two other stations as substitutes for the

format was not financially viable and that many alternate news sources were available were supported by the record. 478 F.2d at 924-25.

¹⁷ *Zenith Radio Corp.*, 38 F.C.C.2d 838 (1972), *reconsideration denied*, 40 F.C.C.2d 223 (1973), *vacated sub nom. WEFM*.

¹⁸ Statement of Chairman Burch, *et al.*, 40 F.C.C.2d at 230-32.

format being changed. In one case, the station did not serve exactly the same geographic area as WEFM. In the other case, the station had a "fine arts" format which the court thought was not necessarily a substitute for the classical music format being abandoned, despite the Commission's finding that the "fine arts" station was broadcasting classical music.¹⁹ In addition, the court demanded that a hearing be held to determine whether the licensee's losses were attributable to the classical music format or to management practices.

For the first time, the court discussed in general terms its rationale for requiring government intervention in the format selection process, instead of relying upon licensee discretion and marketplace forces. It stated:

"[w]e think it axiomatic that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest."²⁰

The court also held that "there is no longer any room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition."²¹ Without citing any evidence, the court asserted that advertisers distorted the radio market by favoring stations catering to young adults and therefore concluded that "broadcasters, left

¹⁹ The court went so far as to posit a regulatory distinction between a classical music station concentrating on older music and one playing more twentieth century classical music. 506 F.2d at 264-65 n.28.

²⁰ 506 F.2d at 268 (footnote omitted). In addition, the court cited Section 303(g) of the Communications Act, which directs the Commission to "generally encourage the larger and more effective use of radio." 506 F.2d at 267.

²¹ 506 F.2d at 267.

entirely to themselves by the FCC, would shape their programming to the taste of that segment of the public [young adults]."²² It ruled that the marketplace could not be relied on to allocate formats.

Thus, the court directed that when an assignment or transfer application proposes a format change which would result in the loss of a unique format which "serves a specialized audience that would feel its loss,"²³ a hearing must be held to determine whether the public interest would be served by the assignment unless the existing format was not financially viable. The court did not specifically address what steps the FCC should take at the conclusion of the hearing. However, the clear implication of the court's decision was that the agency would have to ensure that an existing format not be altered if it was found to be unique, financially viable and preferred by a significant segment of the audience in the station's service area.

Once again, there was no indication that the court gave any consideration to the legislative history of the Act or to constitutional issues presented by such regulation. Judge Bazelon concurred in the result despite significant doubts concerning the constitutionality of such program regulation. 506 F.2d at 268-84. Judges Robb and MacKinnon dissented. 506 F.2d at 284-85, 285-86.

The Commission's Inquiry Into Format Policy

The *WEFM* decision deepened the Commission's concern as to its proper role in format selection. That decision and other decisions of the court of appeals had not provided the FCC with an opportunity for general analysis of the implications and extent of FCC involvement in format changes, and interested parties, apart from the litigants in those cases, had also lack oppor-

²² 506 F.2d at 268.

²³ *Id.* at 262.

tunity to comment on these issues. The Commission was troubled that the course on which the court had embarked might entail serious adverse public interest consequences without countervailing benefits. Moreover, it was disturbed that the court had mandated broad and unprecedented program review without any consideration of the First Amendment implications of its decisions. The Commission therefore initiated an inquiry seeking both comments on what its policy should be and proposals for administering any regulatory approach it might adopt. *Notice of Inquiry: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580 (1976), FCC App. 60a [hereinafter *Notice of Inquiry*].²⁴

More than 50 parties submitted comments supporting and opposing format regulation; these comments included several studies of the broadcast market. One study, the Henabery Report,²⁵ examined the development of specialized formats and demonstrated that a wide variety of formats was already available, particularly in major markets. Focusing on two particular markets as examples, the report further noted that, although the differences between two stations' formats were often subtle, they could result in wide variations in attractiveness to listeners, and that a station's format rarely remained static, but changed substantially over time in response to changes in audience tastes. The report concluded that

²⁴ Among the questions on which the Commission sought comment were whether the Commission should categorize formats, what burdens should be placed on persons objecting to format changes, what bases should be used to determine which of two unique formats would be preferable, and in what types of proceedings format questions should be considered. 57 F.C.C.2d at 584-85, FCC App. 70a-71a.

²⁵ See note 4, *supra*. Mr. Henabery is a consultant specializing in the development of new radio formats and has substantial experience in broadcasting. Jt. App. 42-43.

a government agency could not adequately define or distinguish formats, and that regulation would stifle innovation.

The Commission also received an analysis by economist Bruce Owen, who criticized the economic assumptions of the court in *WEFM*. Owen Study, Jt. App. 23.²⁶ Owen demonstrated that the court's assumption that an increase in the number of "unique" formats would maximize consumer satisfaction had no basis. The court's approach did not take into account varying degrees of preference for a given format; assigned no value at all to diversity which may exist within a single format type; and failed to take account of the desire of many listeners to have a choice among several stations with seemingly identical programming. Government intervention to preserve "unique" formats, Owen urged, would disserve the public interest both by preventing format changes which might increase the level of overall public gratification and by deterring program innovation. Owen concluded that the existing system, although not a perfect reflection of consumer desires, achieved better results than could any feasible system of regulation.²⁷

²⁶ Dr. Owen, then Assistant Professor of Economics at Stanford University, Jt. App. 25, is now Director, Economic Policy Office, Antitrust Division, Department of Justice. He has written several books and articles on broadcast economics and on communications policy generally.

²⁷ NAB also submitted a study showing the diverse number of formats available in major markets, Appendix 2 to the Comments of National Association of Broadcasters, and data showing that advertisers, contrary to the *WEFM* court's assumption, did not consistently favor stations appealing to one demographic group—young adults. Appendix 4 to the Comments of National Association of Broadcasters. To demonstrate the impossibility of effectively classifying for-

The Commission's Policy Statement

After considering the comments, the Commission issued a policy statement²⁸ in which it concluded that regulation of program formats as required by the court of appeals would not serve the public interest. Any scheme of format regulation, the Commission determined, would result in widespread government entanglement in the editorial decisions of licensees, an area in which Congress had intended to leave decisions to broadcaster judgments.²⁹ It concluded that licensees should be free to determine what programming would best satisfy the listening public.

The Commission also found that since the Act contemplates competition among broadcasters, as this Court has recognized,³⁰ "[licensees] must necessarily [compete] in the domain of program formats, because there is virtually no other form that competition among broadcasters can take." 60 F.C.C.2d at 860, FCC App. 123a. Recognizing that licensee format choice would likely not achieve perfect diversity, the Commission nonetheless found that the benefits of relying on broadcaster judgments outweighed any marginal increase in diversity that regulation might provide. Relying on the Owen Study, a study conducted by the FCC's staff on marketplace format

mats, Metromedia submitted a listing which showed 58 different variations on "middle of the road" formats. Attachment = 2 to the Comments of Metromedia, Inc.

²⁸ *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976), FCC App. 117a [hereinafter *Policy Statement*].

²⁹ *Id.* at 865, FCC App. 133a-34a.

³⁰ *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474-75 (1940) [hereinafter *Sanders Brothers*].

diversity, and other material in the record, the Commission concluded that regulation of formats would not necessarily lead to greater listener satisfaction. There would be no way for the Commission to weigh intensity of listener demand in the abstract, so FCC regulation would have little prospect of attaining greater levels of overall satisfaction.³¹ The Commission stated that:

"the marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (*i.e.*, promoting the greatest diversity of listening choices for the public) or in economic terms (*i.e.*, maximizing the welfare of consumers of radio programs)." ³²

Regulation of format changes would also chill innovation, which the Commission found was aided by marketplace forces.³³ The Commission concluded that such regulation would also impermissibly involve the Commission in continuing surveillance of broadcasters' programming,³⁴ and that this regulation would have to be undertaken without adequate standards. In view of the difficulty of defining or distinguishing among formats, there was no practical way to determine whether one or another format is "unique," or whether by subtle changes in programming a broadcaster has altered an earlier format. Coupled with the difficulties of evaluating claims of financial burden under the standards set by the court, the Commission saw few ways to avoid a hearing when a format change was challenged.³⁵

³¹ *Id.* at 863-64, FCC App. 129a-30a.

³² *Id.* at 863, FCC App. 128a.

³³ *Id.* at 864, FCC App. 131a.

³⁴ *Id.* at 864-65, FCC App. 131a-34a.

³⁵ *Id.* at 862-63, FCC App. 127a-28a. The Commission pointed to the lengthy and complex hearings conducted after

On reconsideration, the Commission reaffirmed its decision,³⁶ stressing that diversity of formats in and of itself could not be equated with the public interest, since the use of that standard would not take into account either intensity of demand or desire for variations within formats.³⁷ Absent any reason to believe that regulation would function better than the marketplace, and with the strong possibility that it might be worse, the Commission saw no reason to engage in a scheme of intrusive surveillance.³⁸ In summary, the Commission found that, although free choice of formats would not result in perfect diversity, government regulation of format changes would be inconsistent with the Communications Act, would not advance the public welfare, would create serious administrative difficulties, and would pose grave constitutional problems.

The Court of Appeals Decision

Several parties petitioned for review of the *Policy Statement* pursuant to Section 2342 of the Judicial Code, 28 U.S.C. § 2342. The *en banc* court held the Commis-

the *WEFM* remand as indicative of the problems format regulation would entail. *Id.* at 864, FCC App. 131-32a.

³⁶ *Changes in the Entertainment Formats of Broadcast Stations*, 66 F.C.C.2d 78 (1977), FCC App. 176a [hereinafter *Reconsideration Order*].

³⁷ *Id.* at 81, FCC App. 162a-83a.

³⁸ The Commission contrasted the close control of overall program content involved in format regulation with its limited review of news and public affairs programming, where "the licensee is left with virtually unrestricted discretion in programming most of the broadcast day." *Id.* at 83, FCC App. 187a-88a.

sion's policy statement to be "unavailing and of no force and effect." 610 F.2d at 858, FCC App. 40a.

The court for the first time made clear that the rationale of *WEFM* could not be limited to assignment and transfer cases, but extended as well to renewal applications when the loss of a unique format is involved. 610 F.2d at 849, FCC App. 20a. The court denied that its format decisions constituted judicial formulation of communications policy and insisted instead that the format cases rested on an interpretation of the "public interest" standard of the Communications Act—an interpretation not subject to reexamination by the Commission. The court held that when a change from a format is involved, a hearing must be held unless there is conclusive evidence that there is insignificant public grumbling, that the existing format is the preference of a group too small to be accommodated by available radio stations, that there is an adequate substitute for the existing format in the service area or that the existing format is not economically viable.³⁹

While recognizing that the agency was "better equipped to develop legislative-type facts,"⁴⁰ the court substituted its own factual analysis for the Commission's. Disregarding the conclusions of both the Owen and Henabery reports and the Commission's staff study which confirmed those conclusions, the court continued to find on the basis of "common sense,"⁴¹ without any factual support, that duplication of formats is wasteful and—if achieved through the loss of a "unique" format—contrary to the public interest.

³⁹ 610 F.2d at 843, FCC App. 8a.

⁴⁰ *Id.* at 855, FCC App. 34a.

⁴¹ *Id.* at 857, FCC App. 37a.

In rejecting the Commission's economic analysis, the court repeatedly faulted the Commission for not releasing its staff study of marketplace format diversity prior to its decision so that the public could have commented on it. Nevertheless, the court specifically declined to reject the *Policy Statement* on this procedural point,⁴² and stated that it would not be persuaded of the Commission's position "even if we were to accept the study on its own terms."⁴³

The court below gave scant attention to the serious constitutional and statutory issues raised by format regulation.⁴⁴ As with its previous format decisions, the court did not discuss the legislative history of the Communications Act, and it cited no previous Commission or court decisions which supported format regulation.⁴⁵ Despite

⁴² 610 F.2d at 847 n.24, FCC App. 17a.

⁴³ *Id.* at 856, FCC App. 35a. Prepared largely from published trade materials, the FCC study examined radio formats in the largest metropolitan markets and concluded that great diversity already existed, with diversity within formats being almost as significant a factor in public acceptance as diversity among them. Appendix B to the *Policy Statement*, 60 F.C.C.2d at 872-81, FCC App. 156a-70a. No party has argued that the study contains factual errors.

⁴⁴ The court dismissed the constitutional questions by noting that in *WEFM* it had "found no constitutional impediment to the decision as we understood it." 610 F.2d at 855, FCC App. 33a. Constitutional issues were neither briefed nor argued in *WEFM*, and the only detailed discussion of these issues in the whole history of these cases was in Judge Bazelon's concurring opinion in *WEFM*, in which he expressed doubt as to the constitutionality of the result reached by the court in that case. 506 F.2d at 268-84.

⁴⁵ In contrast to previous adjudicatory cases, however, these issues, as well as constitutional arguments, had been fully briefed and argued.

the court's requirement that the FCC engage in extensive regulation the court somehow concluded that there was

"no authority under *WEFM* to interfere with licensee program choices . . . [or] restrain the broadcasting of any program, dictate adoption of a new format, force retention of an existing format or command provision of access to non-licensees."⁴⁶

The court also denied that its format doctrine required pervasive government entanglement in licensee decision-making, and accused the Commission of misreading and exaggerating the court's decisions. The Commission's concern over administrative problems was discounted because only one case, *WEFM*, had ever gone to hearing, with all others being settled. The court also stated that questions of uniqueness and financial viability could generally be determined without the need for a hearing, although the court's prior decisions had required hearings on just such issues.⁴⁷

Judge Bazelon concurred in the result, based entirely on a procedural point. However, he criticized the majority's lack of deference to the Commission's policy judgment. In his view,

"the majority virtually confines the FCC to a spectator's role in formulating policies that will promote and preserve diversity while minimizing the hazards of government intrusion into the content of broadcasting."⁴⁸

He also observed that the majority had failed "to grapple seriously with the constitutional implications of its decision." 610 F.2d at 859, FCC App. 42a. Judge Leventhal also concurred separately.

⁴⁶ 610 F.2d at 851, FCC App. 25a-26a.

⁴⁷ *Id.*, FCC App. 24a-25a.

⁴⁸ 610 F.2d at 858-59, FCC App. 41a-42a.

Judge Tamm, joined in dissent by Judge MacKinnon, charged that the majority "usurps the proper role of the Federal Communications Commission . . . in the formulation of communications policy." 610 F.2d at 860, FCC App. 46a. The dissent stated:

"In the present case, the majority disregards the Commission's expert knowledge and, in so doing, violates the mandate of *FCC v. National Citizens Committee for Broadcasting* [436 U.S. 775 (1978)].

The majority has lost sight of our role as a reviewing court whose proper function is to uphold an agency's reasonable judgment Faced with a conflict between judicial and administrative policies, I believe we are obliged to uphold the Commission."⁴⁹

The dissenters urged that the majority had no basis for rejecting the Commission's conclusions as to the practical impossibility of distinguishing among formats and of comparing the intensity of preferences for different formats. Similarly, they concluded that the majority had no basis for rejecting the agency's conclusion that more listeners might be satisfied by choices offered by the marketplace than by regulation.⁵⁰ Indeed, the dissent noted that the court of appeals' requirements "favor[ed] the interest of fewer listeners over the interests of more listeners," and observed that "the majority has failed to identify the principle within the Communications Act that mandates [such] regulation."⁵¹

Following the decision of the court of appeals, the Commission and the United States, as well as these petitioners and other private parties, petitioned this Court for writs of certiorari. The petitions were granted and the several cases consolidated on March 3, 1980.

⁴⁹ *Id.* at 865, FCC App. 56a (footnote deleted).

⁵⁰ *Id.* at 862-64, FCC App. 49a-53a.

⁵¹ *Id.*, FCC App. 53a-54a.

SUMMARY OF ARGUMENT

The decision of the court of appeals requires the Federal Communications Commission to abandon a forty-year tradition by instituting a regulatory regime designed to scrutinize changes in "unique" radio program formats when a broadcaster seeks to renew or assign a station license. In dictating regulation in this area, the court arrogated to itself the establishment of communications policy and ignored important statutory and constitutional restraints on government intrusion into broadcast programming.

I.

In setting aside the Commission's policy, the court of appeals identified no provision of the Communications Act specifically mandating format regulation, pointed to nothing in the legislative history of the Act suggesting that such regulation was required and cited no administrative or judicial precedent—other than its own previous format opinions—as authority. Instead, the decision below relied on the broad "public interest" standard of the Communications Act of 1934. Both the legislative history of the Act and numerous decisions of this Court make clear that the definition of the public interest is primarily a matter for the regulatory agency and not for the reviewing court. As this Court held in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978), Congress delegated to the Commission the "weighing of policies under the 'public interest' standard."

The court of appeals primarily rested its decision on the ground that it "is surely in the public interest . . . for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." In fact, the Communications Act imposes no such re-

quirement. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. at 810.

The Commission has consistently determined that under the Communications Act the selection of formats is a matter best left to the editorial judgment of broadcasters, and the agency's interpretation of its governing statute is, of course, entitled to great deference. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 121 (1973) [hereinafter *CBS v. DNC*]. In overturning that interpretation here, the court of appeals exceeded its authority.

Any interpretation of the Act which would require the Commission to regulate the selection of radio program formats is directly contrary to decisions of this Court which make clear that the Communications Act embodies a policy of leaving the selection of programming to broadcasters and is designed "to preserve editorial control of programming in the licensee." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 705 (1979) [hereinafter *Midwest Video*]. See also *CBS v. DNC*, 412 U.S. at 105. In this connection, Congress, during the consideration of the Radio Act of 1927 and the Communications Act of 1934, focused generally on the question whether the agency should be authorized to set program priorities in assigning radio licenses, and specifically on the question whether the agency should be empowered to regulate the types of music to be broadcast (for example, "high class music" as opposed to "jazz"). A proposal to permit the agency to establish programming priorities was eliminated from the bill because of fears of censorship, and these concerns led directly to Section 326 of the Communications Act, 47 U.S.C. § 326, which explicitly prohibits agency censorship. Thus, the only legislative history bearing on the Commission's authority to regulate program formats demonstrates that Congress desired to leave the choice of program formats to broadcasters.

II.

The "public interest" standard necessarily invites reference to First Amendment principles." *CBS v. DNC*, 412 U.S. at 122. Such principles strongly support the Commission's determination not to engage in format regulation.

The regulatory regime established by the court of appeals would thrust the Commission into a programming role it has never before assumed and which the decisions of this Court have never before permitted. For example, the fairness doctrine has been sustained only because it "contemplates a wide range of licensee discretion" and does not dictate or control broadcasters' initial choices of programming. *Midwest Video*, 440 U.S. at 705 n.14. Here, in contrast, the decision requires the Commission, in certain circumstances, to dictate a licensee's entire program schedule by restraining the broadcast of a proposed format and by forcing the licensee to retain an existing format when the broadcaster has affirmatively exercised a contrary editorial judgment. In requiring a broadcaster to present a certain type of programming in place of another, the Commission would be imposing a prior restraint on speech and would be violating the fundamental principle that government regulatory action must be neutral and may not favor one side of an issue or one public taste over another. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978) (Stevens, J.).

In imposing regulatory requirements rejected by the FCC, the decision below conflicts with *CBS v. DNC* where this Court held that the court of appeals could not require the Commission to impose specific programming requirements or override broadcasters' day-to-day editorial judgments. While *CBS v. DNC* involved only spot advertising, here the entire broadcast program schedule is at issue. The court of appeals would deprive

broadcasters of their discretion to select that schedule and would thrust the Commission into detailed regulation of broadcast program content.

The Commission's factual findings confirm that such regulation would contravene the policies of the First Amendment, and these findings are entitled to "great weight." *CBS v. DNC*, 412 U.S. at 102. The Commission found that format regulation would be "unconstitutional as impermissibly chilling innovation and experimentation in radio programming" because broadcasters would be deterred from adopting innovative formats. *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 865-66 (1976), FCC App. 117a, 134a.

The Commission also found that it was not possible to devise adequate standards to regulate radio formats because the boundaries between format types are extremely elusive, because there is no method for objectively gauging public dissatisfaction with the format change, and because it is impossible to compare the relative "public interest" in the existing and proposed formats. The agency would therefore be compelled to make a wide variety of unguided and subjective judgments that would necessarily lead to the imposition of its own program preferences on broadcasters.

ARGUMENT

INTRODUCTION

This case involves the necessity and appropriateness of Commission regulation of radio program formats. The fundamental question is whether the Commission is required to regulate changes in radio formats or whether it may leave such decisions to the judgment of individual broadcast licensees.

The decision below requiring that the Commission engage in such regulation was the culmination of a sharp policy divergence between the Federal Communications Commission and the court of appeals. In a series of decisions commencing in 1970, and ending with the decision under review, the court directed the Commission to engage in active supervision of program format changes despite the Commission's consistent policy against such interference. As in the decisions reversed in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) [hereinafter *CBS v. DNC*] and *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [hereinafter *FCC v. NCCB*], the court of appeals relied on the broad "public interest" standard in mandating specific regulation to reflect its own perception of the public interest.

Unquestionably, the decisions of the court of appeals requiring format regulation represent a radical departure from traditional standards. As the Commission observed, "[f]or over 40 years . . . broadcast applicants have been free to select their own programming formats."⁵² Consistent with that uninterrupted history and based on its long experience in administering the governing statute, the Commission concluded that regulation of radio

⁵² *Notice of Inquiry*, 57 F.C.C.2d at 585, FCC App. 72a.

formats would be contrary to the policies embodied in both the Communications Act and the First Amendment. There is nothing in the Act which suggests that the Commission's determination was impermissible. Indeed, the legislative history as well as past decisions of this Court and the Commission construing the Act and the First Amendment confirm the correctness of the Commission's judgment.

I. THE COMMUNICATIONS ACT DOES NOT REQUIRE THAT THE COMMISSION REGULATE RADIO PROGRAM FORMATS, AND THE REGULATORY REGIME IMPOSED BY THE COURT OF APPEALS CONSTITUTES IMPERMISSIBLE JUDICIAL FORMULATION OF COMMUNICATIONS POLICY

Under the Communications Act, each broadcaster must secure renewal of its broadcast license from the Commission every three years. When a broadcaster seeks to assign a license, advance Commission approval must also be obtained. 47 U.S.C. §§ 307(d), 310(d). In either event the standard is whether the "public interest, convenience and necessity"—the so-called public interest standard of the Communications Act—would be satisfied. 47 U.S.C. §§ 307(d), 309(a), 310(d). Under Section 309(e) of the Act, a hearing must be held if there are substantial and material questions of fact involved in the public interest determination. 47 U.S.C. § 309(e).

Over the course of time program formats are often changed. Such a change may occur at the time that a station is sold to a new entity, reflecting a desire on the part of the new owner to adopt its own approach to programming, or an existing owner may determine to alter its program format in the course of the station's on-going operation because of the unpopularity of the existing format, because the station is not doing well financially, because the tastes of the station's audience

have changed, or because competitors have altered their own programming. The change may also simply reflect the desire of a broadcaster to be innovative. The court of appeals' decision requires regulation of format changes proposed either in an assignment or renewal application, or occurring during a license term, if the station proposes to or has abandoned a "unique" format.⁵³

If a broadcaster seeks to alter a unique format, the court of appeals' decision purported only to require a hearing, thus leaving open the possibility that the alteration might ultimately be approved. However, the court made clear that if sufficient public "grumbling" is present and the existing unique format is financially viable, there is no apparent basis for Commission authorization of a change except possibly where the proposed format is also unique.⁵⁴

In essence, the court required the Commission to dictate a licensee's program schedule by forcing it to continue to play "classical" music or "progressive rock," or "country and western," or "underground," or "easy listening," or "big band"—where the broadcaster has in the exercise of its own programming judgment concluded that a different format or format mix would better serve its audience. Thus, contrary to the court of appeals' suggestion, the decision below does far more than require

⁵³ When a change occurs during the license term, the issue would be considered if raised at renewal time. 610 F.2d at 849 n.29, FCC App. 20a.

⁵⁴ In an earlier case, *WEFM*, the court suggested that where the proposed format would be new to the service area, and would be preferred by a larger number of people than preferred the existing unique format, the Commission might have authority to authorize a change. 506 F.2d at 260. However, the court did not address this possibility in the decision below.

the Commission to "take a station's format into consideration in deciding whether to grant certain applications."⁵⁵ It "restrain[s] the broadcasting of [a new] program" and "force[s] the] retention of an existing format."⁵⁶

Moreover, the premise of the District of Columbia Circuit's format cases—that the Communications Act's "public interest, convenience, and necessity" standard requires interference with broadcasters' program format choices—suggests that still further expansion of program regulation might be required. While the court of appeals did not address the issue, there is a significant danger that the court's rationale could lead it to extend format requirements to proceedings authorizing new stations, thus requiring the Commission to begin evaluating the program formats proposed by these applicants. Indeed, the court of appeals' rationale might be urged to require the Commission to hold marketwide proceedings to consider whether one of two or more existing licensees operating with duplicative formats should be compelled to adopt a unique format to serve some portion of the listening audience which may not presently have available the format which it may prefer. Thus the format doctrine might be extended to require that the Commission engage in the regulation of all stations, and all program formats, so that the Commission would have a far more intrusive role in programming decisions than is purportedly contemplated by the court of appeals.⁵⁷

⁵⁵ 610 F.2d at 851, FCC App. 25a.

⁵⁶ *Id.*, FCC App. 25a-26a.

⁵⁷ The rationale of the decision might even be urged to extend to the regulation of individual programs if there were sufficient public grumbling. The Commission has rejected just such complaints in the past. For example, in *Community Media Corp.*, 61 F.C.C.2d 493 (1976), it rejected a petition to deny a license renewal which claimed that the radio sta-

In contrast to *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) [hereinafter *Red Lion*], and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) [hereinafter *Pacifica*], where specific statutory provisions authorized limited Commission regulation,⁵⁸ no section of the Act requires or encourages the regulation of radio program formats. In imposing this requirement, the court of appeals cited no section of the Act other than the public interest standard. As we demonstrate below, Congress did not authorize reviewing courts to formulate communications policy by defining the requirements of the public interest.

A. The Scope of the Court of Appeals' Review of the Federal Communications Commission Is Strictly Limited and Does Not Permit the Court To Dictate Communications Policy

In the Radio Act of 1927, the Federal Radio Commission was authorized to grant and renew licenses under the public interest standard.⁵⁹ Review of these decisions was vested in the Court of Appeals of the District of Columbia. Section 16 of the Act provided that the court

Mon's cancellation of a certain program, *Flight 105*, was "inconsistent with the public interest, particularly in light of the numerous persons who signed petitions in favor of the continuation of the program." *Id.* at 494.

⁵⁸ In *Red Lion*, Section 315 of the Communications Act, 47 U.S.C. § 315, was cited as explicit authority for the Commission's fairness requirements. 395 U.S. at 380-86. In *Pacifica*, the Commission had relied on Section 1464 of the Criminal Code, 18 U.S.C. § 1464, which expressly forbade the use of "obscene, indecent, or profane language by means of radio communications." 438 U.S. at 731.

⁵⁹ Radio Act of 1927, ch. 169, §§ 9, 11, 44 Stat. 1162. While initially this plenary authority was to be temporary, in 1929 Congress extended it for an indefinite period. Act of December 18, 1929, ch. 7, 46 Stat. 50.

could "alter or revise the decision appealed from and enter such judgment as to it may seem just."⁶⁰ That Act was construed by the court of appeals as conferring *de novo* review authority and as authorizing the court to determine the "public interest" in particular regulation.⁶¹ *FRC v. General Electric Co.*, 281 U.S. 464 (1930), confirmed that interpretation, finding that the court was in effect acting as "a superior and revising agency."⁶² However, this Court held that it could not review such determinations by the court of appeals because its own appellate jurisdiction was limited to judicial functions, and it could not "exercise or participate in the exercise of functions which are essentially legislative or administrative."⁶³

Congress reacted quickly to the Court's decision in *General Electric*. A bill was introduced to revise Section 16 to provide "[t]hat the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it is shown clearly that the findings of the Commission are arbitrary or capricious."⁶⁴ In the course of the debate it was noted that "[u]nder its interpretation of the appeal provision in the existing

⁶⁰ Radio Act of 1927, § 16.

⁶¹ See *Chicago Federation of Labor v. FRC*, 41 F.2d 422 (D.C. Cir. 1930); *Great Lakes Broadcasting Co. v. FRC*, 37 F.2d 993 (D.C. 1930); *General Electric Co. v. FRC*, 31 F.2d 630 (D.C. Cir. 1929), *cert. dismissed*, 281 U.S. 464 (1930).

⁶² 281 U.S. at 467.

⁶³ 281 U.S. at 469. At that time the court of appeals exercised both judicial and legislative functions. See P. BATOR, R. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 47 (2d ed. 1973).

⁶⁴ H.R. 12599, 71st Cong., 2d Sess. (1930).

law the Court of Appeals of the District of Columbia assumed to perform the function of a *superradio commission*, substituting its judgment and discretion for that of the Federal Radio Commission."⁶⁵ In enacting the bill,⁶⁶ Congress made clear that the reviewing court was to have a far more limited function.

Section 16, as amended, was incorporated without change as Section 402(e) of the Communications Act of 1934⁶⁷ and the review standards of the 1930 Act were essentially applied to all agencies by Section 10(e) of the Administrative Procedure Act.⁶⁸ In decisions construing

⁶⁵ 72 CONG. REC. 11530 (1930) (emphasis supplied).

⁶⁶ Act of July 1, 1930, ch. 788, 46 Stat. 844.

⁶⁷ Communications Act of 1934, ch. 652, § 402(e), 48 Stat. 1064 (1934) (current version at 47 U.S.C. § 402(g)).

⁶⁸ After the enactment of the Administrative Procedure Act, the Communications Act was amended so that the standards of judicial review under the Administrative Procedure Act would be applied to FCC decisions. Act of July 16, 1952, ch. 879, § 14, 66 Stat. 711. The Administrative Procedure Act limits the scope of judicial review of agency policy judgments to deciding whether the agency's "action, findings and conclusions" are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The legislative history of the Administrative Procedure Act confirmed that court review of agency action is

"generally limited to the inquiry whether the administrative agency acted within the scope of its authority. The wisdom, reasonableness, or expediency of the action in the circumstances are . . . matters of administrative judgment to be determined exclusively by the agency."

Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. 87 (1941).

these statutes, this Court has repeatedly confirmed that where the court of appeals reviews actions of the Federal Communications Commission under the public interest standard, the court should not exercise a policy-making role or function as "a superradio commission."

FRC v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266 (1933), addressed the changes brought about by the 1930 amendment. There the Commission had granted permission to a licensee for the expansion of its broadcast service to a frequency already occupied by two other licensees, and ordered the other stations to cease operations. The court of appeals set aside the Commission orders, concluding that the evidence demonstrated that the public interest would not be served by terminating the licenses.⁶⁹

This Court reversed, holding that the court of appeals had exceeded its power. It found that the standard of review established by the 1930 amendment:

"is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review."⁷⁰

Subsequent decisions of this Court have confirmed that the Commission has primary responsibility for defining the public interest. *FCC v. NCCB*, 436 U.S. at 810; *National Broadcasting Co. v. United States*, 318 U.S. 190, 224 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940). In cases involving other agencies the Court has also held that where standards such as "public interest, convenience and necessity" are in-

⁶⁹ *Nelson Bros. Bond & Mortgage Co. v. FRC*, 62 F.2d 854, 857 (D.C. Cir. 1932), *rev'd*, 289 U.S. 266 (1933).

⁷⁰ 289 U.S. at 276.

involved, "[t]he very breadth of the statutory language precludes a reversal of the [agency's] judgment save where it has plainly abused its discretion."⁷¹ Moreover, where an agency acts under such general standards, its discretion is particularly broad when it determines not to regulate as contrasted with the situation in which it acts affirmatively to impose a regulatory regime.⁷²

In the last decade this Court on two occasions found that the court of appeals had engaged in impermissible policymaking where that court had ordered regulation which the Commission had rejected under the public interest standard.

In *CBS v. DNC*, the Commission had concluded that public access requirements would not advance either the public interest or the goals of the First Amendment, and had declined to order broadcasters to sell time for editorial advertising.⁷³ The court of appeals set aside the Commission's decision, holding that the Communications Act and the First Amendment required that time be sold and ordering the Commission to establish an appropriate regulatory scheme.⁷⁴ This Court reversed. Finding that

⁷¹ *SEC v. Chenery Corp.*, 332 U.S. 194, 208 (1947). See also *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293-94 (1974).

⁷² See *FCC v. NCCB*; *CBS v. DNC*. Where the agency determines not to act, its judgment may reflect not only its view that such regulation is undesirable, but also its conclusion that the agency's limited resources might better be devoted to other regulatory tasks.

⁷³ *Democratic National Committee*, 25 F.C.C.2d 216 (1970), *rev'd sub nom. Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS v. DNC*; *Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970), *rev'd*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS v. DNC*.

⁷⁴ *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS v. DNC*.

"nothing in the language of the Communications Act or its legislative history compels a conclusion different from that reached by the Commission,"⁷⁵ this Court determined that the court of appeals had improperly abrogated the agency's authority under the public interest standard. The court of appeals was admonished for "fail[ing] to give due weight" to the Commission's "judgment in these matters."⁷⁶

FCC v. NCCB was similar. There the Commission, again acting under the public interest standard, had adopted a regulation barring new co-located newspaper-broadcast combinations, but had declined to order divestiture of existing combinations except in sixteen "egregious cases."⁷⁷ The District of Columbia Circuit held that the grandfathering of most combinations was "arbitrary and capricious" and ordered the Commission to promulgate regulations requiring divestiture.⁷⁸

This Court reversed, holding that the Commission's decision should be sustained since it was based upon findings that "were primarily of a judgmental or predictive nature,"⁷⁹ and because Congress delegated to the

⁷⁵ 412 U.S. at 122.

⁷⁶ *Id.* at 123.

⁷⁷ *Second Report and Order* (Docket No. 18110), 50 F.C.C.2d 1046 (1975), as amended upon reconsideration, 53 F.C.C.2d 589 (1975), *rev'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, *FCC v. NCCB*.

⁷⁸ *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, *FCC v. NCCB*.

⁷⁹ *FCC v. NCCB*, 412 U.S. at 813.

Commission authority for the "weighing of policies under the 'public interest' standard."⁸⁰

B. The Court of Appeals in this Case Has Impermissibly Substituted its Policy Judgment for the Policy Judgment of the Commission

The court of appeals in this case has substantially departed from the appropriate standards of judicial review. Despite the court's purported recognition that it "has neither the expertise nor the constitutional authority to make 'policy' as that word is commonly understood,"⁸¹ there can be little doubt that it was in fact making policy and not, as it claimed, merely articulating "the law of the land."⁸² As the separate opinions observed, "the majority virtually confines the FCC to a spectator's role"⁸³ and, in prescribing policy for the Commission, has "lost sight of [its] role as a reviewing court."⁸⁴ In doing so the court of appeals also ignored this Court's admonition in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978), that "[a]dministrative decisions should be set aside . . . only for procedural or substantive reasons as mandated by statute . . . [and] not simply because the court is not happy with the result reached."⁸⁵

⁸⁰ *Id.* at 810.

⁸¹ 610 F.2d at 854, FCC App. 32a.

⁸² *Id.*, FCC App. 32a (emphasis in original).

⁸³ *Id.* at 858-59, FCC App. 41a-42a (Bazelon, J., concurring).

⁸⁴ *Id.* at 865, FCC App. 56a (Tamm, J., dissenting).

⁸⁵ See generally *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 348 (1953).

To be sure, the Commission's authority to define the "public interest" is not unlimited, particularly where other policies of the Act are involved, such as those favoring freedom of broadcaster program choice. However, here the court of appeals did not identify a single recognized ground for setting aside the Commission's judgment.

As we discuss below,⁸⁶ there is no basis for contending that the Commission's format decision was inconsistent with prior agency policies or adjudications. Neither was the Commission's decision otherwise "arbitrary or capricious." The court of appeals did not make any such determination, nor did it remand the case to the agency as would have been appropriate if it had believed that the Commission's findings were unreasonable.⁸⁷

⁸⁶ See pp. 51-53 *infra*.

⁸⁷ While at one point the court questioned the "rationality" of the Commission's decision (610 F.2d at 846, FCC App. 14a), and at other places questioned certain of the Commission's factual findings (*e.g.*, *id.* at 847-49, 853, 856-57, FCC App. 17a-20a, 29a-30a, 37a), the decision below was based on the court's view that, no matter how rational the Commission's decision might have been, the public interest standard requires regulation of radio program formats as a matter of law.

The court of appeals, although criticizing the Commission for its reliance on a staff study depicting the degree of diversity in broadcasting because the study was not made available for comment, did not rely on this alleged error as a ground for reversing the Commission. *Id.* at 847 n.24, FCC App. 17a.

No one has advanced any substantive objections to the study or explained how such objections might properly have dissuaded the Commission from relying on the study. In one

The policy-making nature of the court of appeals' decision is readily apparent when its grounds for reversing the Commission are examined.

First, the court suggested that the Commission "displayed a deep-seated aversion to the decisions of this court"⁸⁸ and failed to view them "sympathetically."⁸⁹ Thus, the court stated that the Commission had exaggerated the adverse impact of the court of appeals' prior decisions and at the same time had failed "to take affirmative steps to minimize what it perceived as the intrusive features of the format decisions."⁹⁰ The court was also critical of the Commission for suggesting that the implementation of format regulation would lead to

of the cases relied on by the court of appeals in criticizing the Commission, the court said:

"[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results" *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (1973), *cert. denied*, 417 U.S. 921 (1974).

In any event, the alleged procedural defects regarding the staff study would not have been sufficient to warrant the court of appeals' rejection of the *Policy Statement*. As Judge Tamm noted, if that procedural defect is "sufficient to alter the normal standard of review of administrative decisions, then a remand to the Commission is proper." 610 F.2d at 864, FCC App. 54a.

⁸⁸ 610 F.2d at 849, FCC App. 21a.

⁸⁹ *Id.* at 852, FCC App. 27a.

⁹⁰ *Id.* at 849, FCC App. 21a.

an "administrative nightmare" and for finding, supposedly without adequate evidence, that such regulation would deter licensees from adopting unique formats.⁹¹ The court similarly criticized the Commission for failing to define individual program formats so as to minimize the difficulties of distinguishing between different formats.⁹²

As we discuss in detail below (pp. 62-70), the court of appeals had no basis for rejecting the Commission's findings as to the effects of format regulation, based on an extensive record and the agency's expertise in the field of broadcasting. But even if the Commission had overstated the difficulties of implementing the court's requirements or failed "to take affirmative steps to minimize" those difficulties, these are hardly legal grounds for mandating a regulatory regime. Surely the Commission is not required to engage in regulation simply because such regulation might be easy to implement. The court of appeals' reasoning suggests the substantial extent to which it misperceived its role as a reviewing court.

Second, and more important, the decision below rests upon the court's own unsupported construction of the public interest standard and on its view that the Commission must regulate program formats to achieve program diversity; that each significant segment of the listening audience is entitled to receive the particular program format that it prefers; and that the Commission cannot properly leave these programming judgments to individual licensee choice and to the marketplace.

⁹¹ *Id.* at 849, 851, FCC App. 21a, 25a.

⁹² *Id.* at 853, FCC App. 29a.

Regulation is required because, in the court's view, the marketplace does not always function properly.⁹³

Despite the court's emphasis on the supposed differences between its assessment and the Commission's assessment of the marketplace, the court, like the Commission, observed that "market forces do generally provide diversification of formats."⁹⁴ Similarly, the Commission, like the court, found that "[t]he market allocation method is not . . . perfect."⁹⁵ Thus, the Commission's reliance on licensee judgment was not in fact based on any notion that the market could perfectly reflect listener format preferences. Just as editorial freedom does not achieve perfection in journalism,⁹⁶ so here, the marketplace does not always achieve what might be viewed by a government agency as the most desirable result. Indeed, as the Commission suggested in its decision, a "perfect result" is unobtainable.⁹⁷ Having recognized that all those wishing to speak cannot be accommodated in the broadcast

⁹³ The court found, without the slightest support in the record, that "broadcasters . . . tend to serve young adults with large discretionary incomes in preference to demographically less desirable groups." *Id.* at 851, FCC App. 24a. The only authority cited was the earlier court of appeals decision in *WEFM*, 506 F.2d at 268. In fact, the only evidence presented to the Commission was to the contrary. See Appendix 4 to the Comments of National Association of Broadcasters.

⁹⁴ 610 F.2d at 851, FCC App. 24a.

⁹⁵ *Policy Statement*, 60 F.C.C.2d at 863, FCC App. 128a.

⁹⁶ *CBS v. DNC*, 412 U.S. at 124-25.

⁹⁷ *Policy Statement*, 60 F.C.C.2d at 863, FCC App. 128a.

medium,⁹⁸ it similarly follows that the particular program preferences of all listeners cannot be satisfied.

What the Commission concluded was that the market possessed a degree of flexibility "which no system of regulatory supervision could possibly approximate."⁹⁹ It doubted that greater diversification would result from the requirements imposed by the court of appeals, and concluded that whatever speculative benefits might be achieved were outweighed by the importance of preserving freedom of licensee choice and minimizing Commission involvement in programming, both of which are important goals of the Communications Act. The Commission's judgment was entirely consistent with this Court's observation in *FCC v. NCCB* that there is nothing "in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to 'presume' that its diversification policy should be given controlling weight in all circumstances."¹⁰⁰ This judgment was also fully consistent

⁹⁸ *CBS v. DNC*, 412 U.S. at 101; *Red Lion*, 395 U.S. at 376.

⁹⁹ 60 F.C.C.2d at 864, FCC App. 131a.

¹⁰⁰ 436 U.S. at 810. In *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938, 962-63 (D.C. Cir. 1977), *aff'd in part and rev'd in part*, *FCC v. NCCB*, the court of appeals also relied on Section 303(g) of the Act, which obligates the Commission "to encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), for its holding that the policy of diversification should be controlling. 436 U.S. at 809. In the *WEFM* format decision, the court similarly relied upon Section 303(g) for its view of the importance of diversity. 506 F.2d at 267. This interpretation of Section 303(g) was repudiated by this Court in *FCC v. NCCB*, 436 U.S. at 809-10. The decision below cited only the public interest standard, suggesting that the court is no longer specifically relying on the "larger and more effective use" language of Section 303(g) to support its program format doctrine.

with the legislative history of the Communications Act which emphasizes the importance of broadcaster freedom of program selection.

C. The Communications Act Reflects a Policy of Leaving Broad Latitude to Licensees in the Selection of Programming

1. *This Court has recognized that the general policy of the Act is to leave the choice of programming to broadcasters*

The Commission's statutory authority to engage in program regulation is narrowly limited. For example, while the Commission is authorized by statute to implement the fairness doctrine, sustained by this Court in *Red Lion*, and the prohibitions against obscenity and indecency in Section 1464 of the Criminal Code, 18 U.S.C. § 1464, as narrowly construed by this Court in *Pacifica*, the agency has neither the obligation nor the authority to engage in general program regulation. The general policy of the Act is to leave programming judgments to individual licensees to the maximum possible extent.

That policy was recognized by this Court soon after the enactment of the 1934 Act in *Sanders Brothers*. There the issue was whether the Commission could authorize a competing station in an area already served. Just as the Commission here held that competing radio formats are beneficial, there the Commission held that the existence of one service in an area should not foreclose further competitive services. In upholding the Commission's decision, this Court observed that in enacting the 1927 and 1934 Acts:

"Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his

ability to make his programs attractive to the public.”¹⁰¹

While the court of appeals in an earlier format decision rejected the teachings of *Sanders Brothers* on the ground that that case had been undermined by “more recently” decided authority,¹⁰² this Court has repeatedly confirmed the importance of preserving freedom for broadcaster judgment in the area of program content.

As this Court noted in *CBS v. DNC*, after reviewing the legislative history of the 1927 Radio Act, “Congress appears to have concluded . . . that of [the] two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided.”¹⁰³ The Court found that this choice was expressed in various provisions of the Communications Act, including Section 3(h)¹⁰⁴ and Section 326¹⁰⁵ which

¹⁰¹ 309 U.S. at 475. Applying this governing concept to the facts of this case, the Commission concluded that “meaningful competition between stations must necessarily focus on program formats. There is virtually no other area in which competition is possible.” *Reconsideration Order*, 66 F.C.C.2d at 79, FCC App. 179a.

¹⁰² *WEFM*, 506 F.2d at 267. The court suggested that *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943), which upheld rules designed to promote the free choice of programming by licensees, impliedly limited the holding of *Sanders Brothers*. The *NBC* decision hardly undercuts the preeminence of broadcaster freedom of program choice under the Communications Act.

¹⁰³ 412 U.S. at 105.

¹⁰⁴ 47 U.S.C. § 153(h). Section 3(h) provides that “a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”

¹⁰⁵ 47 U.S.C. § 326.

this Court cited as evincing a “legislative desire to preserve values of private journalism.”¹⁰⁶

Last Term, *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), confirmed the importance of licensee control over programming. The Commission’s access rules for cable television were held invalid, in large part, because they barred operators “from determining or influencing the content of access programming.”¹⁰⁷ In invalidating the regulation the Court found that similar requirements directed to broadcasters could not be sustained.¹⁰⁸ The Court contrasted access regulation with the fairness doctrine which “contemplates a wide range of licensee discretion”¹⁰⁹ and reaffirmed “the policy of the Act to preserve editorial control of programming in the licensee.”¹¹⁰

2. Congress specifically considered and rejected proposals which would have authorized the agency to regulate radio program formats

Congress not only adopted general policies favoring freedom of licensee choice, it also focused specifically on the question of whether the Commission could choose among various types of programming selected by licensees, and establish priorities as to subject matter. It concluded that the Commission should have no such authority.

During Congressional consideration in the early 1920s of legislation to regulate broadcasting more effectively, attention was given to the standards that the government would apply in choosing among applicants for the

¹⁰⁶ 412 U.S. at 109.

¹⁰⁷ 440 U.S. at 702.

¹⁰⁸ *Id.* at 706-08.

¹⁰⁹ *Id.* at 705 n.14.

¹¹⁰ *Id.* at 705.

limited number of radio frequencies. In this context, the issue of whether the proposed agency should be authorized to set subject matter "priorities" in granting radio licenses was a major focus of the legislative inquiry. At hearings before a House Committee, the Solicitor of the Department of Commerce (which administered a 1912 statute governing the radio industry¹¹¹) was specifically asked whether the Department considered programming priorities in awarding licenses:

"Is the fact they are going to broadcast sacred music—does that have any more effect on getting a license than the fact that you are going to broadcast jazz? Do you take that into consideration?"

The Solicitor replied that "there never has been any policy of preference to any particular class as against any other class [of stations]." ¹¹²

Various Congressmen and other interested parties were not satisfied with the existing practice of the Commerce Department, and suggested that the new agency be given greater power. The question of authorizing the agency to set program priorities had arisen as early as the First National Radio Conference, organized in 1922 by then-Secretary of Commerce Herbert Hoover to study the growing problems of radio communications and to make recommendations for increasing federal regulatory powers.¹¹³ At that conference, Congressman Wallace

¹¹¹ Radio Communications Act of 1912, ch. 287, 37 Stat. 302.

¹¹² *Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37 (1926).

¹¹³ The proceedings of the National Radio Conference were cited by this Court in *Red Lion* as an important part of the legislative history of the Radio Act of 1927. 395 U.S. at 375 n.4.

White, later the author and floor manager of the bill that became the basis for the Radio Act of 1927, took an active role.

During a discussion of a broadcaster's desire to broadcast sermons and symphony concerts unencumbered by advertising messages, in contrast with the programming available from commercial ventures, Congressman White inquired about the advisability of establishing priorities among types of radio programs. Posing hypothetical choices between "religious sermons" and "prize fight reports," between "crop reports" and "baseball reports," between "baseball" and "horseracing" coverage and between a "sermon" and "sacred concert," Congressman White observed that "I don't want the Secretary's job of defining a priority," and that it would be difficult to establish programming priorities without "go[ing] pretty close to censorship."¹¹⁴

Despite his substantial misgivings, Congressman White subsequently incorporated in a bill language designed to give the government the power to establish such priorities for particular classes of stations.¹¹⁵ That bill would have authorized the licensing authority, in the public interest, to classify stations, to determine the nature of the service to be presented, and to:

"prescribe . . . the priorities as to subject matter to be observed by each class of licensed stations and of each station within any class"

While this bill never passed the House,¹¹⁶ the same issue re-emerged in connection with House consideration

¹¹⁴ Minutes of Open Meeting of Dep't of Commerce Conference on Radio Telephony, Feb. 27-28, 1922, at 95-96. See also *id.* at 11, 123-24.

¹¹⁵ H.R. 7357, 68th Cong., 1st Sess. § 1(B) (1924).

¹¹⁶ See 66 CONG. REC. 2361 (1925); 68 CONG. REC. 2572 (1927).

of the bill that subsequently became the basis for the Radio Act of 1927.¹¹⁷ In that bill, language of the earlier bill which would have authorized the government to establish program priorities was deleted. During hearings on this revised bill, Congressman Davis, a member of the House Committee, alluded to the existing inability of a "high-class music" station to broadcast without interference from a station "on the air with a lot of jazz music."¹¹⁸ He inquired whether there "ought not to be some provision [in the new bill] to afford a better and more wholesome set of programs than sometimes exist."¹¹⁹ In his view it was necessary to "put something in the act specifically to authorize and direct [the agency] to take those matters into consideration in determining who shall and who shall not receive licenses and renewals."¹²⁰

At this point, it was objected that a provision for individual licensing on the basis advocated by Congressman Davis might well "be almost the entering wedge to censorship." Congressman White, the author of the legislation, confirmed that no such programming priorities were authorized by his bill. In fact, he noted that such authority had been intentionally deleted from his earlier bill "because of the fear which had been expressed by so many to me that that did confer something akin to censorship."¹²¹

¹¹⁷ H.R. 5589, 69th Cong., 1st Sess. (1926).

¹¹⁸ *Hearings on H.R. 5589, supra* note 112, at 38.

¹¹⁹ *Id.* at 39.

¹²⁰ *Id.*

¹²¹ *Id.* At the same time the bill had retained language authorizing the licensing agency to establish classes of radio stations and to prescribe "the nature of the service to be rendered by each class of licensed stations and each station

The bill was subsequently passed by the House¹²² without granting the agency any power to establish program priorities. Opposition to Commission censorship was at least as strong in the Senate, which added a new Section 29 (now Section 326) specifically barring not only "censorship" but any Commission action that would "interfere with the right of free speech by radio communications."¹²³ The Senate version was adopted in conference.¹²⁴

within any class"—provisions that ultimately became Sections 303(a) and 303(b) of the 1934 Act. 47 U.S.C. §§ 303(a), 303(b).

As noted above (note 100, *supra*), the court of appeals in *WEFM* had relied in part on Section 303(g) as requiring format regulation. The deletion from Section 303 of the provision granting authority to the agency to establish program priorities clearly demonstrates that Congress did not intend Section 303(g)—authorizing the agency to "encourage the larger and more effective use of radio in the public interest"—to require the Commission to impose such priorities.

¹²² 67 CONG. REC. 5647 (1926). As passed, the bill was amended and renumbered H.R. 9971. H.R. 9971, 69th Cong., 1st Sess. (1926). See H.R. CONF. REP. NO. 1886, 69th Cong., 2d Sess. 16-17 (1927).

¹²³ *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926). See also H.R. CONF. REP. NO. 1918, 73d Cong., 2d Sess. 49 (1934): "Section 326 prohibits censorship and is the same as section 29 of the Radio Act." Accord, S. REP. NO. 781, 73d Cong., 2d Sess. 8 (1934).

¹²⁴ H.R. CONF. REP. NO. 1886, *supra* note 122, at 19. See also 67 CONG. REC. 5480 (1926) (colloquy involving Representative White); *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926).

[Footnote continued on page 48]

The 1934 Act made no change in these provisions. Indeed, during hearings in 1934 Congressman (by then Senator) White confirmed the purpose of the 1927 Act, stating:

"At one time, in an earlier draft [of the 1927 Act] which I had presented in the House, I did have a direction that the regulatory body should establish priorities as to character of service, but even that was so controversial that it was eliminated from the final draft, and there was a very clear purpose to give no prior rights or preferential recognition to any group or to any service."¹²⁵

¹²⁴ [Continued]

While this Court's opinion in *Pacifica* may be read to suggest that Congress intended to do no more than merely prohibit prior restraints when it enacted the ban on censorship, 438 U.S. at 735, it is clear that Congress was concerned about broader issues of program content regulation, and that Section 326 was part of the Congressional response to these broader concerns. In any event, the court of appeals' requirements here plainly involve the Commission in prior restraint even as that term was construed by this Court in *Pacifica*.

¹²⁵ *Hearings on S. 2910 Before the Senate Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 191 (1934) (emphasis supplied).

Following the passage of the 1927 Act, there was some discussion at Congressional hearings of the Commission's regulatory authority over clear channel stations and whether the agency could prohibit commercial advertising on those stations; in that context Congressman White made a passing reference to possible Commission authority under the existing law to establish program priorities. *Hearings on H.R. 8825 Before the House Comm. on the Merchant Marine & Fisheries*, 70th Cong., 1st Sess. 144 (1928). However, as noted in the text, in connection with the passage of the Communications Act of 1934 Congressman (then Senator) White

In summary, therefore, the only legislative history of the Communications Act bearing on the Commission's authority to regulate program formats demonstrates that Congress declined to grant the agency the power to establish program priorities and expressly barred agency censorship, thus making clear its firm commitment to leaving programming decisions with licensees.¹²⁶ Whether

reaffirmed that the 1927 Act had not been intended to "establish priorities as to the character of service."

Congress in 1934 also rejected a proposal to allocate 25% of all radio stations to educational, religious, agricultural and similar nonprofit associations, in part, because the task of equitably allocating such stations would be impossible. See 78 CONG. REC. 8843-46 (1934). This concern, of course, was identical to that of the Commission in this case. Therefore, Congress requested the Commission to report on whether such an allocation would be desirable, Communications Act of 1934, ch. 652, § 307(c), 48 Stat. 1064 (1934), and the Commission in 1935 reported that it believed that an allocation would be undesirable because sufficient variety and opportunities were present under the existing regulatory scheme. *Report of the Federal Communications Commission to Congress Pursuant to Section 307(c) of the Communications Act of 1934*. While the Commission later licensed a class of noncommercial educational radio stations, see 47 C.F.R. § 73.501 (1979), it has acknowledged the dangers of licensing such stations on the basis of their programming rather than on the basis of their mere status as non-profit educational institutions. *Notice of Inquiry: Amendment of the Commission's Rules Governing the Eligibility for Non-commercial Educational FM and TV Broadcast Station Licenses*, 43 Fed. Reg. 30,842, 30,843-44 (1978).

¹²⁶ Another provision of the Communications Act also forecloses Commission regulation of format changes in the assignment/transfer context. Section 310(d) states that in determining whether a proposed assignment or transfer of construction permit or station license is in the public interest, the application "shall be disposed of as if the proposed trans-

the distinction is between "high-class" and "jazz," as it was at the time of the 1927 Act, or between "classical" and "contemporary," as it was in *WEFM*, Congress did not authorize the Commission to assign priorities to one type of programming over another. While regulation in this area might, in one Congressman's words, "afford a . . . more wholesome set of programs,"¹²⁷ there was nevertheless a consensus that it would also involve the regulatory agency in impermissible censorship and would not achieve the public benefits to be derived from licensee selection of program material.

feree or assignee were making application under section 308 of the title for the permit or license in question." 47 U.S.C. § 310(d). The legislative history of that provision, added in 1952, demonstrates that Congress intended to prevent the Commission from giving comparative consideration to "the qualifications of or operation of the facilities by the transferor," with those of the proposed transferee (98 CONG. REC. 7394 (1952)) or to the relative merits of other potential transferees. See Brief for NAB in the court below at 8-16, discussing, *inter alia*, 98 CONG. REC. 7394, 7397, 9022, 9033 (1952); *Hearings on S. 1973 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. 35 (1949); *Hearings on S. 658 Before the House Comm. on Interstate and Foreign Commerce*, 82d Cong., 1st Sess. 73, 96-97 (1951); S. REP. NO. 44, 82d Cong., 1st Sess. 12 (1951).

Obviously a comparison of the transferor with the transferee on the basis of their formats would be contrary to the legislative intent. In peremptorily dismissing the argument that Section 310(d) prohibits this comparison, the court below mischaracterized this argument and apparently ignored this important legislative history. See 610 F.2d at 852 n.37, FCC App. 26a-27a.

¹²⁷ *Hearings on H.R. 5589, supra* note 112, at 39.

D. The Commission's Consistent Construction of the Communications Act Provides Further Support for the View that the Act Was Never Intended To Allow Regulation of Program Formats

While the Commission to a limited extent reviews programming under the public interest standard as part of the licensing process—for example, inquiring into whether the broadcaster has provided programming responsive to the ascertained needs and interests of the community¹²⁸—the Commission has uniformly held that the choice of specific programs is for the broadcaster. "For over 40 years," the Commission observed, "broadcast applicants have been free to select their own programming formats."¹²⁹

The Commission was apparently not urged to engage in format regulation until the mid-1950s. When the issue did arise, the Commission made clear its view that such regulation was inappropriate. As it noted in 1956, "the Commission has never imposed a definite program format as a prerequisite to an authorization for operation of a television or radio broadcast station."¹³⁰ In response to

¹²⁸ See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).

¹²⁹ *Notice of Inquiry*, 57 F.C.C.2d at 585, FCC App. 72a.

¹³⁰ *Eastern Okla. Television Co.*, 14 P&F Radio Reg. 148, 149 (1956) (dictum). See also *Brush-Moore Newspapers, Inc.*, 20 F.C.C. 919, 967 (1956).

At about the same time, observing that abandonment of a "good music" format would not be a reason for disapproving a license transfer, the hearing examiner stated in *Bay Radio, Inc.*, 22 F.C.C. 1351, 1364 & n.16 (1957):

"The Commission may not properly refuse to consent to the transfer of a station or the assignment of its license merely because the assignee or transferee proposes to change the programming of the station. It has no power

a contention in a comparative television hearing that an applicant "placed undue emphasis on 'hillbilly' music," the Commission ruled that "it is not within [our] purview to be the arbiter of good taste in such matters."¹³¹ The Commission's belief that format selection is a matter best left to the editorial judgment of the license applicant, rather than to administrative regulation, was echoed in subsequent opinions.¹³²

Prior to the present proceeding, perhaps the Commission's most extensive discussion of the problems associated with regulating programming came in its 1960 *En Banc Programming Report*.¹³³ In this seminal statement, the Commission recognized that censorship was inherent in program regulation and that "Congress placed the basic responsibility for all matter broadcast to the public . . . in the hands of the station licensee."¹³⁴ Accordingly,

"the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment

of censorship over the programming of broadcast stations [citing 47 U.S.C. § 326]. Neither can it direct broadcasters . . . to maintain any particular program policy in perpetuity."

¹³¹ *Richmond Newspapers, Inc.*, 20 F.C.C. 185, 219 n.10 (1955).

¹³² See, e.g., *AM-FM Program Duplication*, 2 F.C.C.2d 833, 840 (1966); *WGRY, Inc.*, 2 P&F Radio Reg.2d 718, 723 (1964); *ABW Broadcasters, Inc.*, 1 P&F Radio Reg.2d 65, 70 (1963).

¹³³ 44 F.C.C. 2303.

¹³⁴ 44 F.C.C. at 2311.

of the public interest requires the free exercise of his independent judgment."¹³⁵

Similarly, while the Commission has required that license applicants survey the problems, needs and interests of their service areas and consider what responsive programming should be presented, the Commission stated that licensees are not obligated to present particular programs or particular types of programs that listeners may wish to hear.¹³⁶ Those judgments are left to broadcasters. As the Commission observed in its 1971 *Ascertainment Primer*:

"Our view has been that the station's [entertainment] program format is a matter best left to the discretion of the licensee or applicant" ¹³⁷

It cannot be doubted that the Commission's construction of the Act is entitled to substantial deference. In *CBS v. DNC*, this Court, referring to the Federal Communications Commission, noted that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong."¹³⁸ According weight to a Commission determination is particularly appropriate where the Commission has attempted to accommodate First Amendment concerns¹³⁹ since the "public interest" standard necessarily invites reference to First Amendment principles."¹⁴⁰ As we discuss in the next section, First

¹³⁵ *Id.* at 2308-09.

¹³⁶ *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 679 (1971).

¹³⁷ *Id.*

¹³⁸ 412 U.S. at 121, quoting *Red Lion*, 359 U.S. at 381.

¹³⁹ *CBS v. DNC*, 412 U.S. at 102-03.

¹⁴⁰ *Id.* at 122.

Amendment principles support the Commission decision in this case.

II. FIRST AMENDMENT CONSIDERATIONS STRONGLY SUPPORT THE COMMISSION'S POLICY DECISION

The selection and implementation of program formats, involving a combination of artistic and editorial expression, is at the very core of the decisionmaking process in radio broadcasting. The choice and presentation of music and other entertainment is a form of artistic expression. Similarly, the choice and presentation of news and information by broadcasters is a form of journalistic expression.

Editorial judgments and creative skills are the stuff that program formats are made of—cutting across nearly all aspects of day-to-day station operation. Government regulation of program formats would directly contravene fundamental First Amendment principles designed to protect these activities.

A. The Regulatory Scheme Forced on the Commission by the Court of Appeals Seriously Impairs Basic First Amendment Rights

If the Commission had unilaterally embarked on the scheme of program format regulation mandated by the court of appeals, that scheme would have raised the gravest constitutional questions. As Mr. Chief Justice Burger stressed in *CBS v. DNC*, the radio industry is a system of "essentially private broadcast journalism held only broadly accountable to public interest standards."¹⁴¹ The Commission's role with respect to broadcast program content is limited by both the First Amendment and the

¹⁴¹ 412 U.S. at 120.

regulatory scheme established by the Communications Act.¹⁴² While the Congress and the Commission have imposed certain restrictions on broadcasters that might not be permissible as to newspapers,¹⁴³ the agency is not free to engage in extensive and far-reaching regulation of program content in pursuing its regulatory responsibilities. "The Commission is given no supervisory control of the programs, of business management or of policy."¹⁴⁴ This restriction clearly encompasses the entertainment,¹⁴⁵ as well as the news and informational components of broadcast programming.

Although the Commission has been permitted to oversee certain limited programming aspects of broadcast station operation, it must afford substantial deference to licensee discretion and strictly adhere to the First Amendment principle that the government should not regulate so as to either advance one side of an issue or favor one public taste (whether political, cultural or otherwise) over another. While the general encouragement of diversity of choice is a legitimate public interest objective, the government is precluded from making the actual choices. As Mr. Justice Stevens noted in *Pacifica*, 438 U.S. at 745-46, "it is a central tenet of the First Amendment that the government must remain neutral in the

¹⁴² 47 U.S.C. § 326. See pp. 41-50 *supra*; *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

¹⁴³ See *Pacifica*; *FCC v. NCCB*; *Red Lion*.

¹⁴⁴ *Sanders Brothers*, 309 U.S. at 475. The Court in *CBS v. DNC* also emphasized that the regulatory scheme established by Congress reflected a "legislative desire to preserve values of private journalism." 412 U.S. at 109.

¹⁴⁵ See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("[w]hat is one man's amusement, teaches another's doctrine").

marketplace of ideas." Similarly, the First Amendment denies the "government [the] power to restrict expression because of its message, its ideas, its subject matter, or its content."¹⁴⁶ Program format regulation would not comply with this principle.

The regulatory regime established by the court of appeals would thrust the Commission into a programming role that it has never before assumed and that decisions of this Court have never before permitted. Not only would the Commission have to directly review and assess the artistic and journalistic judgments of individual licensees, it would also in certain cases be required to reject "virtually the entire broadcast schedule proposed by the private licensee," and to direct "a licensee to adopt a particular type of format."¹⁴⁷

No court has ever required or permitted the Commission to determine the general substance of a broadcaster's overall programming and no decision has required the Commission to institute any overall scheme of program regulation which the agency opposed. For instance, the Commission's fairness doctrine—upheld in *Red Lion*—was deemed constitutionally acceptable only because it "contemplates a wide range of licensee discretion."¹⁴⁸ The fairness doctrine is intended to ensure that broadcasters "give adequate coverage to public issues" and that broadcasters who elect to present one side of a controversial issue of public importance will balance that coverage with a broadcast of the opposite view.¹⁴⁹ It does not dictate or control a broadcaster's initial choice of programming or

¹⁴⁶ *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁴⁷ *Reconsideration Order*, 66 F.C.C.2d at 83, FCC App. 188a.

¹⁴⁸ See *Midwest Video*, 440 U.S. at 705 n.14.

¹⁴⁹ *Red Lion*, 395 U.S. at 378.

restrain the broadcast of speech. Indeed, the Court in *Red Lion* cautioned that government "refusal to permit [a] broadcaster to carry a particular program" would raise "serious First Amendment issues."¹⁵⁰

Here, in contrast, the decision below mandated sweeping program content regulation, directing the Commission, under certain circumstances, to dictate a licensee's complete program schedule by forcing it to utilize a certain format—"classical" or "middle-of-the-road" or "country and western" or "all-news" or "all-talk"—where the broadcaster has affirmatively exercised a contrary editorial and artistic judgment. Whether the Commission is considering regulation of broadcast journalism or entertainment formats, the agency would be engaged in overriding basic judgments made by licensees which are protected by the First Amendment. Thus program format regulation would inevitably result in direct prior restraints of free speech—Commission orders requiring broadcasters to refrain from broadcasting proposed programming. The court of appeals gave no indication that it considered the fact that a prior restraint of speech was involved here which in and of itself raises special constitutional concerns.¹⁵¹

Moreover, it is significant that the objective of diversity can be achieved by less drastic means than regulation of radio program formats or other types of direct program regulation. For example, the Commission has, over a period of many years, promulgated regulations restricting the multiple ownership of broadcast stations.¹⁵² So,

¹⁵⁰ *Id.* at 396. See also *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

¹⁵¹ See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-62 (1975).

¹⁵² Commission rules prohibit the cross-ownership of more than one station in the same broadcast service (AM, FM, or

too, its AM-FM non-duplication rule¹⁵³ ensures that AM and FM stations owned by the same entity will not unduly duplicate programming and that the listening audience of a particular community therefore will have more program choices. In addition, the Commission currently has under consideration steps that would significantly increase the number of radio broadcast stations.¹⁵⁴ The Commission has also licensed numerous public broadcasting stations which further increase diversity of format choice in many communities.¹⁵⁵

While promoting the objective of diversity, none of these approaches raises the same constitutional concerns as format regulation. None would ban or directly interfere with a licensee's chosen program material. Nor would the alternatives create a danger that the agency would favor one type of programming over another and therefore one side of an issue or one cultural taste over

television) in the same community; the cross-ownership of a VHF television station and any radio station serving the same community; and the common ownership of more than a total of seven AM, seven FM, and seven television stations (of which only five may be VHF). 47 C.F.R. §§ 73.35, 73.240, 73.636. For a review of the development of these rules, see *FCC v. NCCB*, 436 U.S. at 780-81.

¹⁵³ 47 C.F.R. § 73.242.

¹⁵⁴ *Inquiry Concerning 9 kHz Channel Spacings for AM Broadcasting*, 44 Fed. Reg. 39,550 (1979); *World Administrative Radio Conference*, 70 F.C.C.2d 1193, 1211-14 (1979).

¹⁵⁵ As of March 31, 1980, there were 1,035 non-commercial stations on the air. FCC Public Notice, Broadcast Station Totals for March 1980 (April 9, 1980). These included 228 stations subscribing to National Public Radio, an organization providing its members with a broad selection of programming, including jazz music, documentaries, and a daily news magazine. *Broadcasting*, March 17, 1980 at 54; *THE RADIO FORMAT CONUNDRUM*, *supra* note 7, at 261.

another. Since these "less drastic means" of achieving program diversity do exist, the First Amendment requires that the Commission forego the more restrictive regulatory alternative of direct regulation of formats. See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).¹⁵⁶

In any event, this Court does not have to decide whether Commission program format regulation would be unconstitutional since the Commission decided not to regulate program formats, premising that decision in large part upon its deep First Amendment concerns.

B. The Commission's Policy Decision Affirmatively Sought To Protect These Fundamental First Amendment Values

One of the Commission's primary reasons for initiating the format inquiry was its concern that the First Amendment prohibits the "close scrutiny of broadcast program content judgments"¹⁵⁷ required by the court of appeals. In light of the Commission's longstanding practice,

¹⁵⁶ As we have noted, considerations of program diversity do not justify detailed program regulation by the Commission in any event. It is clear that the less drastic "alternatives" need not be as efficient as the "means" rejected. In *Schneider v. State*, 308 U.S. 147 (1939), a case involving, *inter alia*, a city ordinance requiring those who would distribute pamphlets door-to-door to first secure police approval, the Court acknowledged that the alternatives suggested there may have been "less efficient and convenient" than the challenged ordinance, but concluded that "considerations of this sort do not empower a municipality to abridge freedom of speech." *Id.* at 164.

¹⁵⁷ *Notice of Inquiry*, 57 F.C.C.2d at 522, FCC App. 65a. Accordingly, the Commission sought comment on whether "any system of Commission intervention in, or selection of, licensee entertainment formats [would] violate the First Amendment." *Id.* at 585, FCC App. 72a.

premised on assiduously avoiding entanglements in program format decisions, and given the fact that the court of appeals had required Commission intervention in this area "with nary a syllable spoken to the First Amendment implications of its decision,"¹⁵⁸ we believe the Commission appropriately undertook its own, more comprehensive examination of the First Amendment ramifications of format regulation.

In its *Policy Statement*, the Commission concluded that "[a]ny such regulatory scheme would be . . . unconstitutional as impermissibly chilling innovation and experimentation in radio programming." 60 F.C.C.2d at 865-66, FCC App. 134a. In its view, format regulation would require frequent intervention into the programming decisions of broadcasters, producing "an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion."¹⁵⁹ The Commission's subsequent order denying reconsideration provided further elaboration of its concerns and concluded that "detailed governmental scrutiny into such matters would raise serious First Amendment problems." 66 F.C.C.2d at 82, FCC App. 186a (emphasis supplied).

C. The Court of Appeals Failed To Afford Proper Weight to the Commission's First Amendment Concerns

Despite the Commission's deep First Amendment concerns, confirmed by long administrative experience and tested in a public inquiry, the majority opinion of the court of appeals dismissed the Commission's constitutional concerns.¹⁶⁰ The court's view seems to have been,

¹⁵⁸ *WEFM*, 506 F.2d at 269 (Bazelon, J., concurring).

¹⁵⁹ *Policy Statement*, 60 F.C.C.2d at 865, FCC App. 133a.

¹⁶⁰ See 610 F.2d at 855, FCC App. 33a. Judge Bazelon voiced concern about the "perilous government oversight of the content of expression," urging that, because of the First

first, that the Commission could not rely on such conclusions because it had not provided sufficient factual evidence that the court of appeals' policy had deterred actual licensee format choices and, second, that the Commission had not given sufficient attention to developing standards under which it could regulate formats without the perceived intrusive effects.

In disregarding the Commission's findings and conclusions concerning the constitutional issues, the court below failed to apply the standard of review established by this Court in *CBS v. DNC*. There, the Court emphasized that when the Commission decides not to regulate because of First Amendment considerations, reviewing courts must proceed with utmost caution and with due deference for Commission experience:

"Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century

Thus, in evaluating . . . First Amendment claims . . . , we must afford great weight to the decisions of Congress and the experience of the Commission."¹⁶¹

Amendment difficulties of previous program-related regulation, the court should not "so easily reject the FCC's decision to turn away from this troubling experience and to cast its lot with the marketplace." *Id.* at 859, FCC App. 43a. Judges Tamm and MacKinnon agreed with Judge Bazelon concerning the "substantial" nature of the First Amendment concerns. *Id.* at 861 n.8, FCC App. 48a. The court of appeals failed even to refer to First Amendment issues in the earlier format cases. In *WEFM*, the court expressly declined to discuss First Amendment concerns, reasoning that it "need not . . . wade into such deep waters." 506 F.2d at 267.

¹⁶¹ 412 U.S. at 102 (emphasis supplied).

The Commission's findings here, based on that experience, lend substantial support to its decision.

1. The Commission correctly found that format regulation would have an undue chilling effect on licensees' program judgments

A Commission finding of central significance was that format regulation would be "unconstitutional as impermissibly chilling innovation and experimentation in radio programming."¹⁶² The Commission reasoned—based on comments from the industry, programming experts and its own experience—that "the risks of undertaking innovative or novel programming" might escalate to an unacceptably high level for many licensees "[u]nder the threat of a hearing that could cost tens or hundreds of thousands of dollars."¹⁶³ The cost, delay and uncertainty caused by such hearings would be further exaggerated by prehearing procedures that are often more time-consuming than the hearing itself. Under these circumstances, and in light of the ultimate risk that the government might force retention of a "unique" format, many licensees would be reluctant to pursue new and innovative programming concepts.¹⁶⁴

¹⁶² *Policy Statement*, 60 F.C.C.2d at 865-66, FCC App. 134a.

¹⁶³ *Id.* at 865, FCC App. 132a. The Commission explained that several parties had commented on this effect and that it "regard[ed]" this finding "of great importance." "The existence of the obligation to continue service, we find, inevitably deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no off-setting justifications" *Id.*, FCC App. 132a-33a (emphasis supplied).

¹⁶⁴ As Professor Owen observed, "[it] is doubtful whether such relatively recent innovations as the 'all news' format could have arisen" under the court of appeals requirement.

[Footnote continued on page 63]

The court of appeals dismissed these findings by noting that the Commission had "provided little or no evidence that WEFM has in fact deterred licensees' format choices."¹⁶⁵ The court of appeals also concluded that "the Commission's fears appear somewhat less than realistic" because a "mere handful" of format cases had reached the court of appeals and that, in each of the three where the court held that a hearing was required, the controversy was ultimately settled.¹⁶⁶ The very fact that broadcasters feel compelled to settle cases in order to avoid the burden of a hearing suggests that the Commission's conclusions as to the chilling effect of such regulation are well founded.

Moreover, because of the uncertainties as to the scope of required regulation in the assignment context and because the decision below was the first to extend format requirements to the renewal context, the full impact of that regulation is still not apparent. Under such circumstances, the Commission cannot be expected to produce

¹⁶⁴ [Continued]

Jt. App. at 33. With many stations adhering to more prevalent formats, stations with innovative or unique formats must bear a disproportionate regulatory burden—contrary to established public interest objectives. See *Notice of Inquiry*, 57 F.C.C.2d at 598-99, FCC App. 103a-05a (Statement of Commissioner Robinson).

¹⁶⁵ 610 F.2d at 851, FCC App. 25a.

¹⁶⁶ 610 F.2d at 848, FCC App. 18a-19a. The evidentiary hearings that were, in fact, conducted on remand in WEFM partially illustrate the practical difficulties. Even the limited issues in that case required 18 hearing days resulting in a transcript of 3,120 pages. Literally hundreds of hours were expended in preparing, prosecuting, and adjudicating the case. *Policy Statement*, 60 F.C.C.2d at 864-65, FCC App. 131a-32a.

definitive evidence to prove what is essentially a predictive judgment based on its experience. As this Court emphasized in *FCC v. NCCB*, "complete factual support in the record for the Commission's judgment or prediction is not possible or required." 436 U.S. at 814.

But even if the policy had been fully defined and implemented over the course of many years, it would be extremely difficult to marshal concrete evidence that regulation contrary to the First Amendment has chilled freedom of expression. "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." ¹⁶⁷

2. The Commission correctly found that program format regulation would necessarily require application of subjective and elusive standards

The Commission was also concerned that format regulation would necessarily have to be undertaken without adequate standards. Under decisions of this Court, administrative standards must give adequate guidance, especially where First Amendment interests are involved.¹⁶⁸ Those subject to regulation must have adequate notice of the nature and extent of the requirements in order to avoid chilling protected expression. In addition, the absence of clear and precise standards greatly magnifies the potential for administrative censorship, based simply on an agency's notions of what the public should hear.¹⁶⁹

¹⁶⁷ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). See generally *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

¹⁶⁸ See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 684 (1968); *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 504-05 (1952).

¹⁶⁹ See *Erznoznik v. Jacksonville*, 422 U.S. 205, 217-18 (1975); *Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966).

Here, based on comments received and its own analysis, the Commission concluded that

"it is extremely difficult to ascertain on an objective or principled basis what line distinguishes a given format from its neighbors, and at what point a change in programming may amount to a change of format Any second-guessing of licensee judgment would necessarily be highly subjective, and we are convinced that detailed governmental scrutiny into such matters would raise serious First Amendment problems." ¹⁷⁰

There was ample evidence before the Commission demonstrating the futility of attempting to categorize radio formats in any meaningful fashion.¹⁷¹ Indeed, the Commission observed that the lines between formats were becoming "increasingly obscure."¹⁷² Commissioner Robinson aptly summarized the problem:

"What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format 'unique' (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must

¹⁷⁰ *Reconsideration Order*, 66 F.C.C.2d at 82, FCC App. 186a.

¹⁷¹ See Appendix B to the *Policy Statement*, 60 F.C.C.2d at 872-81, FCC App. 156a-70a; Henabery Report.

¹⁷² *Reconsideration Order*, 66 F.C.C.2d at 82, FCC App. 185a.

be preserved. At that thought the mind swims and the heart sinks." ¹⁷³

Commissioner Robinson's concern appears fully justified against the backdrop of format rulings by the court of appeals. Thus, in *Progressive Rock*, the court cautioned that one station could occasionally duplicate another's selections and yet remain unique.¹⁷⁴ In *WEFM*, the court required the Commission to explore whether or not a "fine arts" station adequately served the "classical" music lovers of Chicago,¹⁷⁵ suggesting that a classical station playing twentieth century music would differ from one offering more nineteenth century music.¹⁷⁶

Moreover, the suggestions concerning format classification advanced by the decision below hardly alleviate the problem. The court, for example, suggested that the Commission "could arrive by rulemaking at a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational."¹⁷⁷ But those imprecise "margins" are precisely the problem, and the Commission found that these definitional problems were

¹⁷³ *Notice of Inquiry*, 57 F.C.C.2d at 594-95, FCC App. 93a-94a. See *Reconsideration Order*, 66 F.C.C.2d at 84-85, FCC App. 191a-92a.

¹⁷⁴ 478 F.2d at 932.

¹⁷⁵ 506 F.2d at 264-65.

¹⁷⁶ *Id.* at 264 n.28. See also *Sentinel Heights FM Broadcasters, Inc.*, 29 F.C.C.2d 83 (1971), *rev'd sub nom. Citizens Committee to Preserve the Present Programming of WONO (FM) v. FCC*, No. 71-1336 (D.C. Cir. May 13, 1971), in which the petitioners charged that the assignee's classical selections would be "unadventurous" and "incongruous" ones compared to those of the assignor. The court of appeals summarily remanded for an evidentiary hearing on the basis of *Atlanta*.

¹⁷⁷ 610 F.2d at 853, FCC App. 29a (footnote omitted).

so pervasive as to render any attempt to develop a "format taxonomy" futile.¹⁷⁸

The court of appeals also suggested that the Commission might not have to consider uniqueness at all, but might substitute a public grumbling test—one that would apparently take into account "certain unique features" not otherwise duplicated in the applicable service area.¹⁷⁹ The willingness of the lower court to abandon "uniqueness" is irreconcilable with its prior emphasis on the importance of that factor,¹⁸⁰ and undermines its own assertion that the doctrine presents a carefully drawn and easily understood requirement. Indeed, the scope of the format doctrine would be further expanded if, as the court also suggests, it applied not just to unique "formats," but to formats that had "certain unique features" which a significant number of listeners wanted to retain. Such a broad formulation of the format doctrine would bring virtually all programming changes of any significance within reach of Commission regulation.

Moreover, increased reliance on "public grumbling" in lieu of "uniqueness" would not provide the agency with

¹⁷⁸ For example, the issues in *WEFM* required testimony from a musicologist concerning the classical programming of stations in the Chicago area. The expert evaluated station offerings in terms of numerous divisions and subdivisions of music types, ranging from opera to musique concrete, and contrasted the stations' emphases during different parts of the day, all in an effort to gauge whether the stations could be found to have the same format. See Joint Proposed Findings of Fact and Conclusions of Law of GCC Communications of Chicago, Inc. and Zenith Radio Corporation, Proposed Findings of Fact 19 (pp. 18-19), 21 (p. 20), and 27 (pp. 23-24), filed April 6, 1976, in FCC Docket No. 20581.

¹⁷⁹ 610 F.2d at 853 n.47, FCC App. 30a.

¹⁸⁰ See *WEFM*, 506 F.2d at 262-65; *Progressive Rock*, 478 F.2d at 929 n.6; *Atlanta*, 436 F.2d at 271-72.

any less subjective a standard. The Commission would have to make many subjective judgments in assessing the size and significance of the group of public grumblers. Should the Commission set a threshold percentage? Is such a percentage feasible given population variations around the country and variations in the number of frequencies assigned to communities of license? Is it enough, for example, if only 16 percent of a community's residents prefer the station's existing format to the proposed format, as in *Atlanta*?¹⁸¹ Should the Com-

¹⁸¹ 436 F.2d at 267. *Atlanta* itself illustrates the inherent difficulties involved in regulating formats on the basis of perceived listener preferences. The court proceeded in that case on the assumption that 16% of Atlanta listeners preferred classical music as their first choice. *Id.* at 269 ("[w]e do not doubt that at our present level of civilization, a 16% ratio between devotees of classical music and the rest of the population is about right . . ."). In reality, the survey conducted by the transferee showed only that 16% of the individuals questioned said that they preferred a classical format to the proposed blend of popular tunes. *Id.* at 267. The survey did not ask which format people most preferred or which station they in fact listened to. Many of those surveyed who preferred classical music to a popular blend may well have preferred another format to classical. Indeed, current industry figures show that only 1.1% of the Atlanta audience regularly listens to WGKA, Atlanta's established classical music station (October/November 1979). *Radio & Records Ratings Report*, 1979, Vol. 2 at 22. For classical stations WGMS (AM) and WGMS-FM in Washington, D.C., the aggregate figure is 2.8%. *Id.* at 147. In a market of twenty stations, it is highly improbable that a format with a 16% share would be abandoned. In fact, it is likely that a station with a 16% share in such a market would be more popular than all others. For example, in Atlanta, no station using any format achieved an audience share as high as 16% in the 1979 ratings. *Id.* at 22.

mission take into account the intensity of each listener's preference?¹⁸² If so, how should that intensity be measured?¹⁸³

Finally, in attempting to weigh the public interest benefits of an existing format against those of a proposed "unique" format, as effectively required by the format doctrine,¹⁸⁴ the Commission would have to inquire into the proposed format's degree of public support as well as its uniqueness. In the case of a proposed format, these inquiries would be even more speculative. A uniqueness determination would by necessity be based on written proposals rather than past programming, and public support could only be gauged by guesswork. The required comparison of the proposed and existing program formats would force the Commission to favor one format over another on the basis of content. In *Pacifica*, Mr. Justice Powell voiced his concern with such an approach:

¹⁸² As the Commission noted, "[t]here is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format." *Policy Statement*, 60 F.C.C.2d at 864, FCC App. 130a (emphasis in original).

¹⁸³ Judge Tamm observed that the majority's theory below "assumes that the Commission will be able to balance number of listeners against intensity of format preference. Consider the top 40/classical format hypothetical. If twenty percent of the listening audience would mildly prefer a second top 40 format and five percent would vigorously prefer retention of the classical format, does the size of one audience outweigh the intensity of preference of the other? The majority opinion offers no clue."

610 F.2d at 863-64, FCC App. 53a.

¹⁸⁴ See *WEFM*, 506 F.2d at 260.

"I do not subscribe to the theory that the Justices of the Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." ¹⁸⁵

There is, in effect, no way for the Commission to attempt to guarantee program diversity, as the court of appeals would require, without making a variety of unguided judgments on the basis of public taste.¹⁸⁶ Under such circumstances, the course chosen by the Commission in its *Policy Statement* is clearly the correct one. As this Court has recognized, "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." *FCC v. NCCB*, 436 U.S. at 796-97, quoting *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938, 961 (D.C. Cir. 1977). Thus, the Commission reasonably determined that there are no meaningful and appropriate standards to avoid these problems.

• • •

In *CBS v. DNC*, this Court reviewed the role of broadcast licensees under the Act and the First Amendment, and affirmed the fundamental principle that licensees, not the Commission, are charged with the task of selecting broadcast programs:

for better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse

¹⁸⁵ 438 U.S. at 761.

¹⁸⁶ The Commission has long adhered to the position that it is not the "national arbiter of taste." See, e.g., *Palmetto Broadcasting Co.*, 33 F.C.C. 250, 257 (1962), reconsideration denied, 34 F.C.C. 101 (1963), *aff'd sub nom. Robinson v. FCC*, 334 F.2d 534 (D.C. Cir. 1964).

this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.¹⁸⁷

The Court in *CBS v. DNC* was especially sensitive to the fact that Commission oversight and resolution of conflicting claims would involve the Commission in programming on a routine basis, threatening enlarged Commission control "over the content of broadcast discussion of public issues."¹⁸⁸ While such a requirement might have been thought to increase the overall diversity in broadcast programming, the Court concluded that "[t]o sacrifice First Amendment protections for a speculative gain is not warranted."¹⁸⁹

In this case, as in *CBS v. DNC*,¹⁹⁰ the court of appeals has overridden the informed judgment of the Commission in a matter that directly involves the day-to-day editorial responsibilities of broadcast licensees. Here, unlike *CBS v. DNC*, which dealt only with spot advertising time, virtually the entire broadcast day is at stake.¹⁹¹ Government control would extend to virtually

¹⁸⁷ *CBS v. DNC*, 412 U.S. at 124-25 (emphasis supplied).

¹⁸⁸ *Id.* at 126.

¹⁸⁹ *Id.* at 127.

¹⁹⁰ *CBS v. DNC* is not even mentioned in any of the court of appeals' format decisions since 1973.

¹⁹¹ While disagreeing with the majority's First Amendment conclusions about the editorial advertising at issue in *CBS v. DNC*, Mr. Justice Brennan agreed that Commission involvement in matters affecting basic programming decisions would raise significant First Amendment questions: "[i]n normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different." 412 U.S. at 199 n.45, quoting 450 F.2d at 654.

all artistic and editorial decisions of broadcasters—engulfing the entire program schedule and impermissibly establishing a “comprehensive, discriminating, and continuing state surveillance.”¹⁹²

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed.

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¹⁹² *Policy Statement*, 60 F.C.C.2d at 865, FCC App. 134a, quoting *Lemon v. Kurtzman*, 401 U.S. 602, 619-20 (1971).

APPENDIX

CONSTITUTIONAL PROVISION AND
STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

“‘Common carrier’ or ‘carrier’ means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.”

Section 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(g), provides:

“Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.”

Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(d), provides:

"No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer period than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action."

Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), provides:

"Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), provides:

"If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full

hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission."

Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), provides:

"No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides:

"Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

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<i>Aberdeen Cable TV Service, Inc. v. City of Aberdeen</i> , 85 S.D. 57 (1970), cert. den. 400 U.S. 991 (1971)	14
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<i>Association of National Advertisers v. FTC</i> , — F. 2d —, 48 LW 2434 (D.C. Cir. Dec. 27, 1979) ..	28
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<i>Columbia Broadcasting System, Inc. v. Democratic National Committee</i> , 412 U.S. 94 (1973) ..	20, 21, 22, 24
<i>Consolidated Edison Co. of New York, Inc. v. Public Service Com'n of New York</i> , — U.S. —, 100 S. Ct. —, 48 USLW 4776 (June 20, 1980)	21
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972)	23
<i>FCC v. Midwest Video Corp.</i> (II), 440 U.S. 689 (1979)	27, 28
<i>FCC v. Pacifica Foundation</i> , 438 U.S. 726 (1978)	21, 22
<i>FCC v. Sanders Brothers Radio Station</i> , 309 U.S. 470 (1940)	17-19, 21
<i>Hotel Dorset Co. v. Trust for Cultural Resources of City of New York</i> , 46 N Y 2d 358 (1978)	2
<i>McGinnis v. Royster</i> , 410 U.S. 263 (1973)	29
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528 (1971)	29
<i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943)	16, 17, 20-3
<i>Nugent v. City of East Providence</i> , 103 R.I. 518, 238 A.2d 758 (1978)	13

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<i>Office of Communication of the United Church of Christ v. FCC</i> (I), 359 F. 2d 994 (D.C. Cir. 1966)	19, 20, 25, 26
<i>Office of Communication of the United Church of Christ v. FCC</i> (II), 425 F. 2d 543 (D.C. Cir. 1969)	19
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	21
<i>Red Lion Broadcasting Co., Inc. v. FCC</i> , 395 U.S. 367 (1969)	16, 20, 21
<i>Sanders Brothers Radio Station v. FCC</i> , 106 F. 2d 321 (D.C. Cir. 1939), revd. 309 U.S. 470 (1940)	18
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969)	23
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	21
<i>TV Pix, Inc. v. Taylor</i> , 304 F. Supp. 459 (D. Nev. 1968), affd. 396 U.S. 555 (1970)	12
<i>United States v. Midwest Video Corp.</i> (I), 406 U.S. 649 (1972)	27
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STATUTES CITED

Federal

Constitution, Am. I	<i>Passim</i>
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<i>New York</i>	
N.Y. Gen. Mun. Law §§ 303, 326 (McKinney 1979 Supp.)	2
N.Y. Exec. Law §§ 812, 815, 819, 821, 829 (McKinney 1979 Supp.)	9, 10
S. Res. 32, 1975-1976 Reg. Sess., N.Y.S. Legis.	5
A. Res. 85, 1975-1976 Reg. Sess., N.Y.S. Legis.	5
Res. Dec. 16, 1974, White Plains Common Council	3, 6
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R.I. Gen. L. §§ 39-19-2, -3, -4, -6, -8 (1977)	13
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<i>South Dakota</i>	
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RCW 35.88.420 (1967)	14
RCW 35.96.020 (1967)	14
RCW 36.55.010 (1963)	14
RCW 36.95.010, .020, .040, .050, .130 (1971)	14
Sections 2-4, 8, Chapter 123, Laws of 1980, amending Chap. 28A RCW	14
OTHER AUTHORITIES	
A. BOOKS AND DIRECTORIES	
Briley, <i>Survey of Franchising and Other State Law and Regulation on Cable Television</i> (FCC 1976)	29
Ford Foundation, <i>The Finances of the Performing Arts</i> (1974)	3
Hochberg, <i>The States Regulate Cable: A Legislative Analysis of Substantive Provisions</i> , Publication P-78-4 (Harvard Univ. July 1978)	29

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<i>Minority/Ethnic Media Guide, USA 1980</i> (Directories International, Inc. 1979)	7, 8, 9, 24
N.Y.S. Com'n on Cable Television, <i>Cable Communications in New York State: An Agenda for Government Involvement</i> (Docket No. 90112) (August 1979)	10-11
<i>Radio Programming Profile</i> (BF/Communications Services, Inc. Winter 1979)	4, 7
U.S. Bureau of Census, <i>1970 Census of Population, Characteristics of Population</i> , vol. 1	8
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<i>ARB Jan./Feb. 1980</i> (Arbitron Inc.)	4-5, 7
"How Blacks and Spanish Listen to Radio (Report 4)" (Arbitron Co. 1978)	7
<i>Radio Facts</i> (Radio Advertising Bur. 1980)	6
<i>Scarborough Report—New York Market 1980</i> (Scarborough Research Corp.), p. 22	7
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<i>Station Programming Profiles—Albuquerque</i> (Katz Radio July 1980)	4
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Carroll, "The Son of the Big Band Sound: A Return to Music of the Thirties," <i>San Francisco Examiner and Chronicle</i> , Dec. 23, 1979 (Datebook Section)	6

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Jacobson, "The Spirit of Saint Louis", 44:22 <i>Opera News</i> 22 (June 1980)	3
Whitman, "A Station Rises, Phoenix-Like, From Its Own Ashes," 22:8 <i>Madison Avenue</i> (August 1980), p. 93	6
1974 (Nev.) Att'y Gen. Op. No. 174	12
1964 (Nev.) Att'y Gen. Op. No. 128	12
1972 Op. (N.M.) Att'y Gen. No. 72-29	13
Ops. (Wash.) Att'y Gen. 65-66, No. 92	14
Chapter 903 of the Laws of 1976, Legislative Memorandum in Support, <i>New York State Legislative Annual-1976</i> , p. 195	2
<i>Broadcasting</i> (October 9, 1978), p. 47	4
<i>Broadcasting</i> (June 9, 1980), p. 46	5
<i>New York Daily News</i> , June 15, 1980, p. 7, col. 1	8
<i>N.Y. Times</i> , Nov. 30, 1974, p. 61	5

**AMICI CURIAE BRIEF OF NEW YORK, DELAWARE,
MINNESOTA, NEVADA, NEW MEXICO, RHODE ISLAND,
SOUTH DAKOTA and WASHINGTON**

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears at 610 F. 2d 838. The Notice of Inquiry and Orders of petitioner Federal Communications Commission (FCC) appear at 57 FCC 2d 580, 60 FCC 2d 858, and 66 FCC 2d 78.

The texts are printed in full in the Appendices to petitioner FCC's Petition in No. 79-824. For convenience, reference to the decision below will be to both the official publication and the FCC's Appendices ("App.").

Consent of the Parties

Consent of the parties is not required since this brief on behalf of the States of New York, Delaware, Minnesota, Nevada, New Mexico, Rhode Island, South Dakota and Washington as Amici Curiae is sponsored by their respective Attorneys General. U.S. Sup. Ct. R. 36.

Interest of Amici Curiae

Amici have three major interests in this case. First, radio is important to the States' cultural and economic lives. Second, radio is a crucial medium by which the citizenry in general is informed of news and public affairs and through which minority groups in particular are brought into the mainstream of cultural and political life. Third, the decision herein may affect the varied patterns of local regulation of the burgeoning cable television industry.

A. Cultural and Economic Life.

As to the first concern, each of the States joining in this amici brief has a very real and substantial interest in promoting a vigorous cultural life. The availability of museums and concerts is important in creating an atmosphere where people will want to live and work, where managers will want to locate their businesses. New York's Legislature has formally recognized the importance of the arts to the State's "economy and tax base" as well as to its People's "educational, recreational and cultural activities" through attracting artists, industries related to the arts, and art lovers. See N.Y. Gen. Mun. Law §§ 303(1) (a)-(b); 326(1) (McKinney 1979 Supp.).¹ Proponents pointed out² that the major cultural institutions "have multi-million dollar payrolls [...] . . . spend millions of dollars annually for goods and services [and] . . . generate substantial sales tax revenues." They "attract people from all over the world to provide a reservoir of talent for such industries as advertising, film and television production, publishing, printing and graphic arts and fashion and industrial design. These industries spend about \$884 million annually and generate \$36.4 million in taxes." While New York is perhaps unique in the extent to which its economy depends on the arts, the arts are important to the economy and cultural life of every State.

¹ The provisions cited contain the legislative findings that were relied on by the New York Court of Appeals in upholding the constitutionality of the statutes. *Hotel Dorset Co. v. Trust for Cultural Resources of City of New York*, 46 N.Y.2d 358, 369-70, 372 (1978).

² Chapter 903 of the Laws of 1976, Legislative Memorandum in Support, *New York State Legislative Annual-1976*, p. 195.

Radio plays an important part in promoting the arts, particularly music.³ Radio enables less popular traditional musical styles (e.g., "big band" sound, classical music, jazz) to reach the new audiences they need if they are to survive.⁴ It informs aficionados of events they can attend and records they can buy. The many tributes paid to the Metropolitan Opera broadcast series on its fortieth anniversary for inspiring new musical groups to form, performers to study and listeners to attend, were a dramatic example of radio's importance to creating concert hall audiences.⁵ Radio can be even more important to the poor, the elderly, the handicapped and those who simply live far from a cultural center, for it brings into their homes the concerts they could not attend.

Each of the amici States has one or more stations in a major market city with an entertainment format that is

³ The threatened loss of WNCN's unique classical music format led the New Jersey General Assembly, the New York City Council and about a dozen other local legislatures in Connecticut and New York to adopt resolutions calling on the FCC to act to preserve the format as a "unique cultural resource" and as "an integral and essential factor in maintaining" the region as "the leading musical [area] in the world." See, e.g., Res. Oct. 21, 1974, N.J. Gen. Assembly; Res. Dec. 16, 1974, White Plains Common Council; Res. 381 (Nov. 14, 1974), N.Y.C. Council.

⁴ A national study conducted in the early 1970s indicated that radio was by far the leading source of classical music for the public. Television brought classical music to a few more people than radio over the course of a year, but radio slightly led records and tape and by far outdistanced television and live performances as the leading source of symphonic music or opera for regular listeners. Ford Foundation, *The Finances of the Performing Arts*, vol. 2 (1974), Tables 5-6, p. 6; Tables B14-B23, pp. 86-91.

⁵ For instance, the administrator of the Opera Theatre of Saint Louis, who founded the company five years ago and led it to its current million dollar budget season, commented that "if it weren't for the Met, we all wouldn't be alive, because the number of people who listen to it on the air is staggering, and that has educated our public." Jacobson, "The Spirit of Saint Louis", 44:22 *Opera News* 22, 23 (June 1980).

unique in that listening area. New York City has one of the country's only jazz stations, two very different classical music stations, a Caribbean music station and a single Country and Western music station. There is only one News and Information and one Beautiful Music station in Wilmington, Delaware. Minneapolis, Minnesota, has a jazz station and one specializing in religious programs. In Nevada, Carson City has a unique religious station while Reno has a Big Band and a News/Talk station.⁶ Albuquerque, New Mexico, has two stations programming for different religious sects and a classical music station.⁷ In Providence, Rhode Island, only one station offers Oldies⁸ while in Sioux Falls, South Dakota, only one programs Beautiful Music.⁹ Seattle, Washington, offers three different religious stations, an All News one and an AM/FM jazz station.¹⁰

Listeners frequently are devoted to particular music formats.¹¹ If a favorite station proposes to change format,

⁶ See *Radio Programming Profile* (BF/Communications Services, Inc. Winter 1979), vol. 1, pp. 182-7, 196-213, 355-6; vol. 2, pp. 230-2.

⁷ *Station Programming Profiles—Albuquerque* (Katz Radio July 1980).

⁸ *Radio Programming Profile*, *supra*, vol. 1, pp. 257-60.

⁹ 62:6 *SRDS Spot Radio Rates and Data* (Standard Rate and Data Service, Inc. June 1980), pp. 751-2.

¹⁰ *Radio Programming Profile*, *supra*, vol. 1, pp. 310-7.

¹¹ Most of the radio audience listens to a number of different stations during the week (turning to news in the morning and to music at night, for instance, or hunting along the dial for a song). Review of the April/May 1978 Arbitron listenership surveys of the top ten markets showed that adults listened to an average of 2.6 stations per week. *Broadcasting* (October 9, 1978), p. 47. Similar calculations based on a later survey of the New York metropolitan area show that an average adult listens to 2.7 of the 45 radio stations with audiences large enough for sampling. See *ARB Jan./Feb. 1980* (Arbitron Inc.), pp. 70-1.

(footnote continued on following page)

they sometimes protest.¹² When they do so, they expect petitioner FCC, as the agency which licenses stations, to act. Thus, when WNCN in New York dropped its call letters and classical music format in favor of progressive rock in 1974, over 105,000 people signed petitions calling on petitioner FCC to hold hearings. Responding to their constituents, the Governors-elect of Connecticut and New York, twenty-three Congresspersons,¹³ thirty-six New York State legislators,¹⁴ the New Jersey General Assembly,¹⁵ as well as about fifteen Connecticut and New York local legislatures, made inquiries and sought to induce petitioner

(footnote continued from preceding page)

In contrast, a large part of the audience for unique format stations listens only to its favorite station. For instance, the New York area survey showed that almost 71 thousand listeners tune only to the Country and Western station, about 39 thousand listen only to one of the classical music stations while over 19 thousand listen only to the other classical music station, and about 10 thousand listen only to jazz. *Id.* pp. 234-5.

¹² While the cases where citizens vigorously fought format changes are better known, it should be noted that many format changes are made between temporarily popular entertainment styles. An Arbitron survey of 500 stations in the top 25 markets indicated that between 1978 and 1979, for instance, less than ten percent of the Mellow, Good Music, Country, Classical and Jazz stations changed format while over twenty-five percent of the Adult Contemporary, Top 40 Disco, Progressive Rock, MOR [Middle of the Road], and Oldies stations did. *Broadcasting* (June 9, 1980), p. 46. When a fad passes, only a small group of partisans may regret a station's format change.

Even when a format is unique and well-established, its audience may not protest because they are not aware of their legal rights or because they prefer what they will be getting or do not care enough for what they are losing. Thus, in the past three years alone, unique classical music formats were abandoned without significant public protest in Baltimore, Sacramento and San Antonio.

¹³ *N.Y. Times*, Nov. 30, 1974, p. 61.

¹⁴ S. Res. 32, 1975-1976 Reg. Sess., N.Y.S. Legis.; A. Res. 85, 1975-1976 Reg. Sess., N.Y.S. Legis.

¹⁵ Res. Oct. 21, 1974, N.J. Gen. Assembly.

FCC to act.¹⁸ Comparable public protests involving local, State and Federal legislators were made in, for instance, the 1976 protest over the threatened loss of WRVR's unique Black jazz format in New York City and the 1976-8 protest over KMPX, a "big band" sound station in San Francisco. Whether the public protests attract audience interest or whether station managements simply work harder when they know how much their audiences care,¹⁹ it is notable that in at least the cases of WNCN, WRVR and KMPX, the allegedly unprofitable format that "had" to be changed is still on the air, apparently at a profit²⁰ and certainly to the benefit of its listeners.

B. News, Public Affairs and Acculturation.

As to Amici's second concern, each of the States joining in this amici brief also has a very real and substantial interest in having its citizens informed of news and public affairs. Radio is a key means of serving that interest, for it is the primary daytime source of news for 46% of all adults nationwide.²¹ Radio stations broadcasting only news have proliferated in the last decade. Providence,

¹⁸ See, e.g., Res. 381 (Nov. 14, 1974), N.Y.C. Council; Res. Dec. 16, 1974, White Plains Common Council.

¹⁹ A few months after the new licensee of KMPX agreed to retain the "big band" sound, the station manager attributed its "fattening advertising revenues" to both a better station management and an "increased share of audience. . . ." Carroll, "The Son of the Big Band Sound: A Return to Music of the Thirties," *San Francisco Examiner and Chronicle*, Dec. 23, 1979 (Datebook Section).

²⁰ The general manager of WNCN following its return to classical music format recently said, "Not only did we survive when everybody said we wouldn't survive—we prospered." Whitman, "A Station Rises, Phoenix-Like, From Its Own Ashes," 22:8 *Mulison Avenue* (August 1980), p. 93.

²¹ *Radio Facts* (Radio Advertising Bur. 1980), p. 11. A 1977 New York area survey indicated that in normal periods adults get 50% of their news from radio, 31% from television, 19% from newspapers and 1% from magazines. *Ibid.*

Reno, Seattle and Wilmington, for instance, each have one while New York City has two very different ones.²⁰

Radio is particularly important in reaching minority racial and ethnic groups. Due to the problems of distributing publications in an economical, timely manner to wide-spread, relatively small clienteles, most print media serving minority groups are national publications, published weekly or less often.²¹ Moreover, minority groups spend considerably more time listening to specialized formats aimed at their interests than to stations aimed at the general public.²² Radio is not only a means by which minority groups receive information about the

²⁰ *Radio Programming Profile*, *supra*, vol. 1, pp. 196-213, 257-60, 310-7, 355-6; vol. 2, pp. 230-2.

²¹ See generally *Minority/Ethnic Media Guide, USA 1980* (Directories International, Inc. 1979), Part I; Print Media, pp. 1-72. For instance, Ukrainians in New York City have a choice of one daily, two weekly, one biweekly and one five times yearly national newspapers and magazines but only one weekly local newspaper. The publications are available at several stores in traditional Ukrainian neighborhoods, but the Ukrainian population itself has substantially spread from those areas and must either travel considerable distances, subscribe by mail, or forego them.

²² A 1978 survey indicated that 50% of all radio listening by Blacks was to Black stations and 41% of all radio listening by Hispanics was to "Spanish formatted" stations. "How Blacks and Spanish Listen to Radio (Report 4)" (Arbitron Co. 1978), p. 4.

Contrary to the usual radio listener's custom of listening to a number of different stations during the week, see p. 4 n. 11, *supra*, nearly 387 thousand persons in the New York metropolitan area listen only to one of the Black format stations and about 232 thousand listen only to one of the Spanish stations. *ARB Jan./Feb. 1980, supra*, pp. 234-5. During the course of a week, one of the leading New York City Black stations will have been listened to by over 778 thousand (42%) of the Black adults in the 28 county "Area of Dominant Influence". *Scarborough Report—New York Market 1980* (Scarborough Research Corp.), p. 22.

political process,²³ it is a focal point for shaping views and developing leaders on minority problems.²⁴

Commercial radio stations in each of the amici States offer some foreign language programming. There are programs for most major ethnic groups, although most such programming is aired only a few hours a week at less popular times of the day and is rarely available throughout the State.²⁵ The importance of radio for ethnic minorities is illustrated most dramatically by Nevada where 41.7% of the population in 1970 reported a mother tongue other than English. Most of the Navajos there live in remote areas

²³ The Court has noted the role that an ethnic group's "cultural and language barrier" can play in making "participation in community processes extremely difficult, particularly . . . with respect to . . . political life." *White v. Regester*, 412 US 755, 768 (1973). Radio is a powerful tool by which the group can overcome the barrier.

²⁴ For example, it was reported, *N.Y. Daily News*, June 15, 1980, p. 7, col. 1, that the new Special Adviser for Hispanic Affairs to the Mayor of the City of New York had "establish[ed] the kind of political credibility that won him almost unanimous approval for the . . . City Hall post" by hosting a Spanish language public affairs radio program. "One of his conditions for taking the job was that he be allowed to keep his radio show." *Ibid*.

²⁵ Major ethnic groups that receive either no foreign language programming or very little (5 hours or less a week) include French, German, Italian, Polish, Spanish and Yiddish speakers in Delaware; Czech, Finnish, French, German, Polish and Swedish in Minnesota; French, German and Italian in Nevada; German in New Mexico; German, Greek, Hungarian, Russian, Slovak, Swedish, Ukrainian and Yiddish in New York; French and Italian in Rhode Island; German in South Dakota; and Czech, Dutch, French, German, Greek, Italian, Polish, Russian and Serbo-Croatian in Washington. See *Minority/Ethnic Media Guide*, *supra*, pp. 118, 124-8, 131-4, 148, 158-9, 163, 166, 176, 178, 184-6, 192, 194-5; U.S. Bureau of Census, *1970 Census of Population, Characteristics of Population*, vol. 1, pt. 9 (Delaware), Table 142, p. 191; *id.*, vol. 1, pt. 25 (Minnesota), Table 142, p. 514; *id.*, vol. 1, pt. 30 (Nevada), Table 142, p. 213; *id.*, vol. 1, pt. 33 (New Mexico), Table 142, p. 272; *id.*, vol. 1, pt. 34 (New York), sect. 2, Table 142, p. 722; *id.*, vol. 1, pt. 41 (Rhode Island), Table 142, p. 269; *id.*, vol. 1, pt. 43 (South Dakota), Table 142, p. 319; *id.*, vol. 1, pt. 49 (Washington), Table 142, p. 359.

and do not have access to television. Few of them are literate in English or the recently developed written Navajo language. They thus depend for news and public information primarily on one radio station broadcasting 10 hours a week in Navajo and another splitting 50 hours a week between Zuni and Navajo.²⁶ Considering, therefore, how relatively little ethnic and racial minority programming there is, it is a surprisingly strong force assisting certain minority groups to integrate themselves into the nation's majority culture without losing their own roots and other groups to participate without losing their separate identities.

C. Local Regulation of Cable Television.

Finally, each of the States joining in this amici brief has a very real and substantial interest in local regulation of community antenna television (CATV) or cable television systems. A decision herein on broad First Amendment grounds might have implications for local regulatory action. The People of the State of Delaware have a unique and specific interest in the regulation of signal content in the context of cable carriage because Delaware has no indigenous commercial television station.

New York permits local government to grant cable franchises, N.Y. Exec. Law § 819,²⁷ but the State Commission on Cable Television retains the final authority to grant or deny a certificate of confirmation. N.Y. Exec. Law § 821. The Commission is "to promote . . . [a cable industry] responsive to community and public interest" and

²⁶ *Minority/Ethnic Media Guide*, *supra*, pp. 132-3.

²⁷ Small cable systems (fewer than 50 subscribers), most master antenna systems and subcontracting leasers are exempt. N.Y. Exec. Law § 812(2) (McKinney Supp. 1979).

There are two different sets of §§ 811 *et seq.* in the Executive Law. The sections cited herein are Article 28 (McKinney Supp. 1979).

to set standards and rules "to assure that cable television companies provide adequate, economical and efficient service to their subscribers, their municipalities . . . and other parties to the public interest." N.Y. Exec. Law § 811. Censorship is prohibited, N.Y. Exec. Law § 829,²⁸ but an affirmative obligation to provide access channels is imposed, N.Y. Exec. Law § 815(2)(b), and the Commission is to "encourage . . . developing programming for the public interest," N.Y. Exec. Law § 811.

The cable industry has grown rapidly in New York, in terms both of franchises and subscribers.²⁹ It is expected to continue rapid growth.³⁰ The State Commission is exploring whether there is sufficient cable capacity to meet

²⁸ Under N.Y. Exec. Law § 829 subdivision (a), the Commission is not to promulgate any rule or regulation which would interfere with the right of free speech by cable. Under subdivision (b), the franchising municipality may not prohibit, limit, or impose discriminatory or preferential fees to encourage or discourage, particular programs or classes or types of programming. Under subdivision (c), no cable company can prohibit or limit any program or class or type of programming presented over a leased channel or over a channel made available for public access or educational purposes.

²⁹ There were 556 franchises serving about 800 thousand subscribers in 1976. By 1979 there were 679 franchises and 1.2 million subscribers. N.Y.S. Com'n on Cable Television, *Cable Communications in New York State: An Agenda for Government Involvement* (Docket No. 90112) (August 1979), Appendix A, "Statistics: Cable Television Service in New York State", pp. 176-7, 181.

³⁰ As of June 1979, there were 246 franchise applications "in process." Short-run projections were for 500 thousand additional subscribers in the New York City area, 165 thousand in neighboring counties, and 65 to 70 thousand in major urban areas upstate. *Id.*, pp. 175-6, 179.

Nationally and in New York about one in five households had cable service in 1979. With the estimated 730 thousand new subscribers statewide, about 1.9 of New York's 6.5 million households, or 30%, will be connected.

needs in view of the large number of local systems with no or few unused channels.³¹

Delaware's Public Service Commission has "exclusive original jurisdiction and regulation" over most of the State's cable systems. Those municipalities which had express or implied charter powers in June 1974 to grant franchises continue to have those powers, but the Commission has "supervision and review jurisdiction and regulation" over them. 26 Del. C. § 201.³² In particular, the Commission can change or modify a municipality-granted franchise "whenever the public interest requires" and can issue a franchise if a municipality's refusal of one "is not in the public interest. . . ." 26 Del. C. § 608. All other cable systems³³ are franchised and regulated directly by the Commission. 26 Del. C. § 601. County franchising and regulation has been preempted. 26 Del. C. § 616.³⁴

The State of Minnesota's regulatory system is quite similar to New York's. Local government grants franchises in accordance with standards to protect "the public interest" and procedures set by the State Cable Communications Board. Minn. Stat. §§ 238.01, .02(5), .04(1), .05, .08(1) (1978). The Board has final authority to confirm or refuse operating permission. Minn. Stat. § 238.09 (1978). Censorship by the Board or a cable company is prohibited. Minn.

³¹ *Id.*, pp. 91-2; Appendix B, "Inventory of Cable System Channel Capacity", pp. 183-193.

³² The Delaware statutes cited herein are published in the 1978 Cum. Supp.

³³ Small cable systems (fewer than 50 subscribers), master antenna systems and subcontracting lessors are exempt. 26 Del. C. § 102(4).

³⁴ Pre-June 1974 cable systems under municipal or county franchises, and even those without franchises, were given certificates of "public convenience and necessity" by the Commission, 26 Del. C. §§ 203(b), 607-8, but were required to come into compliance with the same conditions as operators subsequently granted franchises by the Commission, or risk revocation, 26 Del. C. §§ 606-8.

Stat. § 238.11 (1978). Access channels must be provided, Minn. Stat. §§ 238.05(2)(b), .17(3)(b) (1978), and the State Board is to encourage development of programming for the public interest, Minn. Stat. § 238.01 (1978). Two significant differences from New York are that two or more municipalities can by ordinance set up a Joint Cable Communications Commission to exercise the member municipalities' franchising powers, Act of April 24, 1980, Ch. 614, § 124, 1980 Minn. Sess. L. Serv. 1308 (West), *to be codified as* Minn. Stat. § 238.08(5), and municipalities are not prohibited from encouraging or discouraging types or classes of programming.

The Nevada Public Service Commission supervises and regulates cable television as a public utility. NRS 704.020(f), 711.030, .040, .050, .140 (1979). It issues a "certificate of public convenience and necessity" based on a showing of "public need for the proposed service or acquisition." NRS § 704.330(1), 711.090 (1979). Local government power to franchise and regulate cable has been preempted. 1974 [Nev.] Att'y Gen. Op. No. 174; 1964 [Nev.] Att'y Gen. Op. No. 128. This Court has upheld the Nevada regulatory system against claims that it unduly burdened interstate commerce, that it had been preempted by Federal statutory or regulatory action, and that it violated due process by promoting destructive competition. *TV Pix, Inc. v. Taylor*, 304 F. Supp. 459 (D. Nev. 1968) (3-judge court), *affd.* 396 U.S. 556 (1970).

The State of New Mexico does not regulate cable television.³³ Municipalities have franchising power under the

³³ The only statutes explicitly referring to cable television are the prohibition on theft of services, N.M. Stat. Chap. 63, Art. 10 (1978), and the provisions to prevent excavation damage to cable television lines, N.M. Stat. Chap. 63, Art. 11 (1978). There is also explicit authority for counties or municipalities to fund television translator stations (i.e., relay stations to boost power and rebroadcast a signal) that were not originally and are not now run by a commercial television station. N.M. Stat. §§ 5-2-1, -2 (1978).

home rule provisions of the State Constitution, Art. 10, § 6. See 1972 Op. [N.M.] Att'y Gen. No. 72-29.

The State of Rhode Island franchises and regulates cable through its Division of Public Utilities and Carriers. Local government has no statutory role in the process. R.I. Gen. L. §§ 39-19-3, -6.³⁴ Franchise applicants must show "that the proposed operation will be consistent with the public interest". R.I. Gen. L. § 39-19-4. The Division is to "supervise and regulate . . . so far as may be necessary to prevent such operation from having detrimental consequences to the public interest . . .". R.I. Gen. L. § 39-19-6. The Public Utilities Commission, a separate body from the Division but chaired by the Division's Administrator, R.I. Gen. L. § 39-1-3, can revoke, suspend or alter an operator's certificate after a hearing for "willful violation" of the statutes, R.I. Gen. L. § 39-19-8, presumably including failure to serve the public interest. The Commission may also "revoke or refuse to renew the license of any CATV company whose programs originating within this state are offensive to commonly accepted standards of morality and decency of the community." *Id.*

The State of South Dakota has delegated all regulatory and franchising authority to local government. S.D.C.L.

³⁴ Until Chapter 240 of the Public Laws of 1969, enacting R.I. Gen. L. §§ 39-19-1 *et seq.*, the State had no laws explicitly dealing with cable. In *Nugent v. City of East Providence*, 103 R.I. 518, 523, 238 A.2d 758, 761 (1968), the Court held that the general power to license, regulate and charge fees for occupations and businesses was an attribute of sovereignty pertaining to the State and could not be exercised by local government absent delegation in express terms or by necessary implication. It further held that neither the home rule provisions of the State constitution nor statutes authorizing municipalities to acquire, hold and dispose of property, under certain circumstances, conferred the right to regulate a business. *Id.*, 103 R.I. at 524-7, 238 A.2d at 762-3. It declined to rule on whether cable was a public utility. *Id.*, 103 R.I. at 529, 238 A.2d at 764. Chapter 240 codified the case's holding and defined cable as a "communications carrier", subject to the Division's jurisdiction. R.I. Gen. L. § 39-19-2. The Rhode Island statutes cited herein are General Laws of 1956 (Reenactment of 1977).

§§ 9-35-17, -18 (Supp. 1979).³⁷ Municipalities "may prescribe reasonable quality standards", S.D.C.L. § 9-35-20 (Supp. 1979), clearly including signal quality but arguably including overall service quality.

Cable is considered a "communication utility" in the State of Washington. RCW 35.96.020, 36.88.420 (1967). A company using the public ways for wire or cable communications must obtain a franchise from local government, RCW 35.27.330 (1965),³⁸ and if necessary, a right of way from the county, RCW 36.55.010 (1963). The newly reorganized Public Broadcasting Commission has been mandated to encourage the development of a State system of public, not-for-profit broadcasting, including cable television, but may not operate its own station or originate its own programs. Sections 2-4, 8, Chapter 123, Laws of 1980, amending Chap. 28A RCW.³⁹

³⁷ Until the enactment of Chapter 52 of the Laws of 1972, the State had no laws explicitly dealing with cable. In *Aberdeen Cable TV Service, Inc. v. City of Aberdeen*, 85 S.D. 57, 62-3 (1970), cert. den. 400 U.S. 991 (1971), the Court found that S.D.C.L. § 9-35-3 was nonetheless applicable. The use of local streets for the system's wiring was held to make cable a "common carrier" subject to the State Public Utility Commission's supervision and to require approval of franchises by local voters.

In response, the Legislature enacted Chapter 52. The new laws specifically found that cable required local regulation, S.D.C.L. § 9-35-17 (Supp. 1979), and gave municipalities "exclusive jurisdiction" to approve franchises, among other things, "by ordinance" and "[n]otwithstanding the provisions of § 9-35-3 . . ."; that is, without submitting the proposition to a vote of the electors. S.D.C.L. § 9-35-18 (Supp. 1979).

³⁸ After obtaining a franchise for one purpose, e.g., telephone, the company does not have to apply for a separate franchise to operate a CATV system. Ops. [Wash.] Att'y Gen. 65-66, No. 92.

³⁹ Washington also permits a county without a CATV system to set up a Television Reception Improvement District to raise funds for the construction, maintenance and operation of a television translator station. A county with CATV can also establish such a District if it has a translator station established before August 1971. RCW 36.95.020 (1971). Before establishing a District, the Board of County Commissioners must decide, after a public

(footnote continued on following page)

Summary of Argument

Citizens own the airwaves and lease radio frequencies to broadcasters on terms and conditions to use as trustees for limited periods. One of those conditions is that broadcasters serve the "public interest".

Under this Court's decisions, citizens have a right to a diversity of formats on the airwaves under the "public interest" standard of the Communications Act of 1934 and under the First Amendment. Without judging the value or merit of a particular radio station format, petitioner FCC can determine whether it is duplicative of other formats in the listening area. Would-be broadcasters who propose duplicative formats need not be granted licenses. Licensees who have lessened diversity by abandoning a unique format need not be granted a renewal.

When citizens see that their property has been misused, they have a First Amendment right to petition for redress of their grievances to petitioner FCC. Petitioner FCC can and should develop reasonable standards to accommodate both listeners' and broadcasters' First Amendment rights in the infrequent situations where the market does not adequately protect diversity on the airwaves.

Cable television is largely a matter for State regulation and a wide variety of very different approaches are being followed in response to local conditions. The decision below was made in the context of an unusual administrative proceeding and a different regulatory and statutory system. To protect the freedom of the States to explore other possible regulatory approaches, the Court is respectfully urged to note that its decision herein need not necessarily apply to State regulation of cable television systems.

(footnote continued from preceding page)

hearing, that it "would serve the public interest." RCW 36.95.040, .050 (1971). Once established, the District station must "serve the public interest, convenience, and necessity . . ." RCW 36.95.010 (1971). It may not originate programs. RCW 36.95.130(2) (1971).

POINT I

Radio listeners are entitled under the First Amendment and the Federal Communications Act of 1934 to diversity on the air. When a licensee threatens to deny listeners their entitlement, they have a right under the First Amendment and the Communications Act to petition the Federal Communications Commission to protect that diversity.

This Court held in *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969), that:

"Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the FCC."

Red Lion upheld the Fairness Doctrine, requiring licensees "to give reply time to answer personal attacks and political editorials", *id.* at 396, and noted that the FCC, *id.* at 395:

"neither exceeded its powers under the [Communications Act] nor transgressed the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)."

In *NBC v. United States*, *supra*, the Court had held that denial of a station license under "the public interest, convenience, or necessity" standard of the Communications Act of 1934, 47 U.S.C. §§ 307(a), (d), 309(a), 310 and 312,⁴⁰ was "not a denial of free speech". 319 U.S. at 227. It specifically interpreted the "public interest" criterion to permit the FCC to refuse a license to a person, even though "financially and technically qualified", who wished to "present a single service over . . . two stations" in one area. *Id.* at 218.

The Court was presented with format issues in *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), but resolved the case on other grounds. The Sanders Brothers, licensee of an existing 24-hour radio AM station, had sought to intervene before the FCC in opposition to a construction permit application for a competing day-time only station. The existing station intended to continue offering "sponsored network programs", while the permit applicant planned

"a program service especially designed to serve the agricultural and educational needs of the surrounding rural area 'far more comprehensive in scope than programs of the same general character now broadcast by [the Sanders Brothers station]'; and [to] broadcast

⁴⁰ The standard is set forth explicitly in the first four of the cited provisions as a condition for granting, renewing or approving the transfer of a station license or for granting a construction permit. Section 312, the fifth provision, originally covered both revocation (subdivision a) and modification (subdivision b) of licenses and construction permits. Chapter 879, July 16, 1952, 66 Stat. 716, amended § 312 extensively and transferred the substance of subdivision b, including its express use of the "public interest" standard for modifications, to its present location in § 316(a). Subdivision a of § 312 has never explicitly incorporated the "public interest" criterion, but arguably that standard has always been implicit in the authority to revoke a station license or construction permit for conditions "which would warrant refusing to grant a license or permit on an original application . . ."

stock market reports daily, while [the Sanders Brother Station] does not and will not." *Sanders Brothers Radio Station v. FCC*, 106 F. 2d 321, 325, 326 (D.C. Cir. 1939) [quoting from FCC brief], revd. 309 U.S. 470 (1940).

The Circuit Court found that the different formats offered might give rise to economic competition and that the FCC had to consider possible injury to an existing station before granting a construction permit. *Ibid.*

In reversing, this Court noted the primacy of listeners' rights over broadcasters, 309 U.S. at 475-6:

"Plainly it is not the purpose of the [Federal Communications] Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public . . . We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license."

At the same time, the Court noted that totally unregulated competition between stations with different formats was not within the intent of the Communications Act. The FCC was required to consider economic loss to stations with competing formats in terms of its effect on the service provided listeners as one of the factors under the public interest standard. *Id.* at 476. If, for instance, the new station's format was not likely to attract enough listeners to become profitable but instead to draw enough listeners and advertising revenue from the existing station's format to render it unprofitable, then the FCC should consider the potential loss to listeners of the services of both formats due to economic injury as a factor in determining whether

to issue a license. *Ibid.* In the case at hand, the Court found adequate support in the record for the FCC's determination that "there was need . . . for the services of both stations", and that the public interest, convenience, and necessity would be served by granting the construction permit. *Id.*, at 472, 475.

Listeners seeking to enforce their rights under this Court's decisions unfortunately have repeatedly seen petitioner FCC treat their claims with "[a] curious neutrality-in-favor-of-the-licensee", to use Mr. Chief Justice, then Circuit Judge, Burger's phrase in an analogous case, *Office of Communication of the United Church of Christ v. FCC* (II), 425 F. 2d 543, 547 (D.C. Cir. 1969).

In the original *Office of Communication of the United Church of Christ v. FCC* (I), 359 F. 2d 994, 1006 (D.C. Cir. 1966), then Circuit Judge Burger held that the FCC had to allow standing to one or more members of the public to assert and prove their claims in their petition to deny renewal of a television station license. Those claims included format issues" as well as violations of the Fairness Doctrine.

The decision in *UCC v. FCC* (I) clearly contemplated that in future license renewal proceedings, listeners would intervene to assert their legitimate interests in such format issues as "programming deficiencies or offensive overcommercialization." *Id.* at 1005. Mr. Chief Justice Burger even suggested, *ibid.*, that the FCC recognize that "[s]ome consumers need bread; others need Shakespeare . . . [and] consider the people's needs more significant than administrative convenience." [Cahn,] *Law in the Con-*

⁶ Petitioners claimed the station "failed to serve the general public because it provided a disproportionate amount of commercials and entertainment", *id.* at 998, and because its programs gave "very much less television exposure" to Negro individuals and institutions than to others and were "generally disrespectful toward Negroes". *Id.* at 998 n. 4.

sumer Perspective, 112 U. Pa. L. Rev. 1, 13 (1963).” He noted that, 359 F. 2d at 1003:

“A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.”

Mr. Chief Justice Burger’s observations in *UCC v. FCC* (I) were, of course, the precedential base for the first format case, *Citizens Committee to Preserve the “Voice of Arts in Atlanta” v. FCC*, 436 F. 2d 263, 272 (D.C. Cir. 1970), and remain largely applicable to the present Format Inquiry on certiorari review.

Reviewing programming issues, this Court has recognized that the First Amendment and the “public interest” standard of the Communications Act entitle listeners to variety in the radio programming aired, including the esthetic experience provided by it. *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390; *NBC v. United States*, *supra*, 319 U.S. at 217-8. It might even be permissible in some instances to override a broadcaster’s journalistic judgment in selecting programs although dilution of licensee responsibility for programming is not favored, *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 131 (1973) (BURGER, C.J., opinion of the Court), and it is preferable for the FCC to state the goal to be met (*e.g.*, Fairness in covering public affairs, no indecent language), allowing broadcasters discretion in programming to meet that obligation at peril of losing their licenses if the FCC finds that the pro-

gramming aired has failed to achieve that goal.⁴² *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-51 (1978); *CBS v. DNC*, *supra*, 412 U.S. at 131 (BURGER, C.J., opinion of the Court); *id.*, 412 U.S. at 132, 135 (STEWART, J., concurring). One goal implicit in the Communications Act is to foster diverse formats and in granting a license, the FCC is to consider possible economic injury to competitors with different formats only insofar as it affects (*e.g.*, through station failure) the adequacy of service to listeners and the public interest. *FCC v. Sanders Brothers Radio Station*, *supra*, 309 U.S. at 476. Moreover, the FCC may refuse a license to a broadcaster whose proposed programming would lessen, or fail to enhance, diversity. *NBC v. United States*, *supra*, 319 U.S. at 218. If, then, a broadcaster proposes to abandon a unique format, one found to foster diversity and serve the public interest, nothing in this Court’s decisions prevents the FCC from denying him a license for that frequency.⁴³

⁴² Evaluation of a station format’s uniqueness could be accomplished with a minimum of intrusiveness. See p. 24 n. 48 *infra*. It connotes no approval or condemnation of content (while trash is quite common on the air, unique trash is still unique). To the extent that consideration of programming in license decisions might be viewed as content-based regulation, it is no more intrusive than review of the content of the expression in libel, commercial speech or obscenity cases. See *Consolidated Edison Co. of New York, Inc. v. Public Service Com’n of New York*, — U.S. —, 100 S. Ct. —, 48 USLW 4776, 4778 n. 5 (June 20, 1980).

⁴³ If a prospective licensee’s arguable free speech right to offer a duplicative format, see Brief of Insileo Broadcasting Companies, Point II, outweighed radio listeners’ right to diverse formats, *NBC v. United States*, *supra*, 319 U.S. at 218, on the initial grant of license, then it might not be permissible to deny a governmental benefit, renewal of a license, because the broadcaster had diminished diversity. See *Branti v. Finkel*, — U.S. —, 100 S. Ct. 1287, 1293 (1980), citing *Perry v. Sindermann*, 408 U.S. 593, 597-8 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). But *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390, establishes that the First Amendment interest of listeners in diverse formats outweighs the rights of current or potential broadcasters. Consideration of the extent to which a format is unique is thus permissible in both granting and renewing licenses.

The question presented by the decision below is whether listeners have the right to call to account a broadcaster who freely chose to adopt a unique, financially viable⁴⁴ format and built up a substantial audience for it, but later proposes to abandon that format and its listeners (610 F. 2d at 842-3, 851; App. 4a-8a, 24a-25a).⁴⁵ It is not "program supervision" or "editorial control" to review what has already been broadcast to see if it met with the public interest in unique formats. Cf. *CBS v. DNC*, *supra*; *FCC v. Pacifica Foundation*, *supra*. It does not interfere with editorial selection of individual programs to inform an applicant that he will not receive a license for a duplicative format. *NBC v. United States*, *supra*. How then does it become impermissible to tell a broadcaster that his application will be favored if it promises a unique format and may be denied if he abandons a format that has well served the public interest?

Amici will not attempt to address herein petitioners' multifarious objections to consideration of formats in licens-

⁴⁴ In many cases the financial viability question will be more important than uniqueness. A common thread linking many of the format cases thus far has been listener allegations of deliberate station mismanagement in order to justify abandoning a unique format as unprofitable. There is thus added significance in the fact that most format cases have been settled with the old format preserved or restored and that most such stations appear to be operating at a profit. See p. 6, *supra*.

⁴⁵ The court below noted that its decision applied to consideration of format changes as a factor in granting initial license applications, license renewals, or approval of transfer applications, but did not require FCC approval of format changes during a license's term (610 F. 2d at 849 & n. 29; App. 20a & n. 29).

ing.⁴⁶ We do believe it important to note that the decision of the court below does not prescribe *how* petitioner FCC must treat format questions; it merely requires petitioner FCC to make an honest attempt "to develop administrative standards instead of simply abdicating . . ." (610

⁴⁶ Many of petitioners' arguments are restatements of those raised and answered below. Thus, the Court of Appeals' format decisions do not require petitioner FCC to regulate formats in all cases; they presume market forces will ordinarily provide diverse formats. All that is required is that petitioner FCC consider format change as a factor in evaluating a licensee's performance under the public interest criterion of the Communications Act (610 F. 2d at 851; App. 24a-25a). So viewed, the format decisions no more impose common carrier obligations, violate the First Amendment, or constitute censorship than does the Fairness Doctrine (610 F. 2d at 851-2, 854-5; App. 26a, 31a, 33a). Requiring broadcasters to meet programming requirements in order to receive a license or renewal no more infringes their right to free speech than requiring motorists to agree to obey traffic laws infringes their fundamental personal, unconditional, *Dunn v. Blumstein*, 405 U.S. 330, 388, 341 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969), right to travel. Petitioner FCC does not appear to have seriously attempted to implement the format decisions, and its administrative impossibility objections seem captious (610 F. 2d at 849.54; App. 21a-32a). See p. 24 nn. 47-8, *infra*. The format decisions have not, on petitioner FCC's own showing, stifled innovation (610 F. 2d at 851; App. 25a), and the format decisions do rely on competition for diversified programming except when it is clear the market has failed (610 F. 2d at 851; App. 24a).

The court below was careful to preserve a proper relation with the agency by giving all due deference to petitioner FCC's interpretation of its statute but reluctantly recognized that that interpretation could not be sustained. It left petitioner FCC free to develop an interpretation consistent with this Court's decisions and to implement that reading of the statute (610 F. 2d at 852-5; App. 27a-33a).

Not surprisingly, petitioners have abandoned in this Court their "administrative nightmare" argument (610 F. 2d at 847-9, 857; App. 17a-20a, 38a). They do not attempt to explain the apparently serious procedural irregularities (610 F. 2d at 846-7, 850, 856; App. 14a-17a, 22a-23a, 34a-35a).

The new arguments in this Court on legislative history and statutory interpretation appear to be a reversal of the government's position in *NBC v. United States*, *supra*, where the Solicitor

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F. 2d at 852; App. 27a).⁴⁷ A wide variety of approaches have been suggested (610 F. 2d at 852-4; App. 28a-32a). Amici Attorneys General respectfully submit that reasonable standards can be developed, standards that will satisfy both broadcasters' limited First Amendment right to freedom of speech and listeners' First Amendment entitlements to diversity on the air and to petition for redress when such diversity is denied them, for the "infrequent situations" (610 F.2d at 854; App. 31a) where petitioner FCC must look at formats.⁴⁸

(footnote continued from preceding page)

tor General and petitioner FCC argued that the statutory language and legislative history of the Communications Act authorized the agency to promulgate regulations affecting programming and that those regulations were constitutional. The new arguments are, in any event, on the whole irrelevant. The fact that Congress refused to give preference to one type of programming over another, Brief for FCC, Point I.B, for instance, in no way implies that Congress did not want petitioner FCC to foster diversity of formats.

⁴⁷ The Court of Appeals did not fail here to provide specific answers to the objections raised by petitioners as it had in *CBS v. DNC*, *supra*, 412 U.S. at 126. It answered them directly and thoroughly (610 F. 2d at 848-9, 851-4; App. 18a-20a, 24a-26a, 29a-31a). But having shown why the objections were invalid, it was careful not to fall into the complementary error of providing an excessively detailed outline of how petitioner FCC should carry out its responsibilities.

⁴⁸ Changing duplicative formats has thus far prompted few if any listener protests. The FCC could, therefore, reasonably presume a format was unique if its change elicited significant listener grumbling.

As a practical matter, determining whether a format is unique is usually not likely to be difficult. Whether a station is the only one in a listening area offering a particular entertainment format, see pp. 3-4 *supra*, all-news, see pp. 6-7 *supra*, or programming directed to a particular ethnic or racial minority, see pp. 7-9 *supra*, can often easily be determined by reference to the licensing forms on file with petitioner FCC. Less elegantly but even more easily, the self-descriptions of station formats published in several industry directories, e.g., *Minority/Ethnic Media Guide*, *supra*, could be consulted, as was done in this Brief.

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As amici for States with considerable interests in the protection and encouragement of unique radio formats, see "Interest of Amici Curiae" *supra*, we are concerned that our citizens' voices be heard when they assert their First Amendment right to petition for redress of grievances as to the use of the airwaves, a valuable, limited property, see *UCC v. FCC* (I), *supra*, 359 F. 2d at 1003, which, all concede, belongs to them. Unfortunately, the "deep-seated aversion" displayed by petitioner FCC to considering format issues (610 F. 2d at 849; App. 21a) precludes reliance on its taking independent action to protect the public interest in this area. As in *UCC v. FCC* (I), *supra*,

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A slightly more difficult task is posed when two stations in the same market offer, for instance, all-news or Black-oriented programming. A more fine-grained analysis considering, e.g., if one news station programmed repetitive modules of news several times an hour while the other emphasized in-depth coverage of a few stories, whether one Black station concentrated on religious programming and the other on popular music, could easily be made using the same sources. It seems clear that petitioner FCC could make such analyses with little or no review of individual programs. It produced such an analysis in this proceeding (610 F. 2d at 853; App. 30a).

Petitioner FCC's arguments are based on the assumption that it would have to probe formats down to the level of individual music selections. Nothing in the decisions of the court below would require such a result if petitioner FCC conducted an unprejudiced inquiry that developed "a rational classification schema" (610 F. 2d at 853; App. 29a) for a less intrusive determination of uniqueness. In *Citizens Comm. to Save WEFM v. FCC*, 506 F. 2d 246, 264-5 (D.C. Cir. 1974), for instance, the court below gave deference to petitioner FCC's "expertise to make reasonable categorical determinations" and noted that the question of uniqueness arose because the licensee described the format it wished to abandon as "classical music" while the substitute station described its format as "fine arts." Although the *WEFM* court noted that one classical music format may be sufficiently different from the other's that the loss of either would lessen diversity, 506 F. 2d at 264 n. 28, it left open the question of whether the FCC could find them to be "rough substitutes" without a hearing on that issue. *Id.* at 265.

where listener action was needed to induce the FCC to look critically at the racially biased programming of the licensee, so too here petitioner FCC needs "the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general," 359 F. 2d at 1003, by providing a "listener appraisal of a licensee's performance," *id.* at 1007, and by assisting the agency to evaluate if the public interest has been served, *id.* at 1004-5. Amici submit that the court below correctly held that listeners are entitled under the First Amendment and the Communications Act to diversity in radio formats and to petition for redress when a unique format is threatened.

POINT II

To assure that the freedom of the States to explore other possible regulatory approaches is preserved, the Court should explicitly note that its decision herein on Federal regulation of radio need not necessarily apply to State regulation of cable television systems.

The decision under review herein is singular. It involves suggestions of, in the true sense of the word, extraordinary behavior by the regulatory agency (610 F. 2d 846-7, 850, 856; App. 14a-17a, 22a-23a, 34a-35a).⁴⁹ Moreover, resolution of the issue involved, consideration of format changes in radio licensing decisions, is profoundly influenced, and perhaps controlled by, the statutory context of the Communications Act. See Point I *supra*.

The Court has noted that petitioner FCC has only "a circumscribed range of power to regulate cable television" under the Communications Act. *FCC v. Midwest Video Corp.* (II), 440 U.S. 689, 696 (1979), citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.* (I), 406 U.S. 649 (1972). The FCC's jurisdiction over cable is limited to that "reasonably ancillary to . . . effective . . . regulation of television broadcasting." *United States v. Southwestern*

⁴⁹ At points, the court below seems to question the right of the administrative agency to review the court's decisions (610 F. 2d at 850; App. 22a), while petitioner FCC questions the Court of Appeals' right to review the agency's policy decisions. Brief for FCC, Point II. Amici Attorneys General respectfully submit that both are over-reacting, perhaps because the long confrontation between them (610 F. 2d at 850; 21a) has led them to behave less like working partners than strangers (610 F. 2d at 860; App. 44a) (LEVENTHAL, J., concurring).

It is not infrequent for one of the State administrative agencies amici Attorneys General represent to receive a lower court decision which it regards as wrong. As long as the agency ap-

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Video Corp., *supra*, 392 U.S. at 178. The Court has noted that the First Amendment rights of cable operators may differ from those of broadcast licensees. *United States v. Midwest Video Corp.* (II), *supra*, 440 U.S. at 707 n. 17.

The individual States continue to franchise cable systems and, except to the extent that the FCC has preempted jurisdiction, to regulate them. As illustrated by *Amici* herein, see pp. 9-14 *supra*, the States have adopted a wide variety of regulatory systems in response to local condi-

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proaches the decision with deference to the court's legal rulings and with a mind open to be persuaded on the facts, we see nothing wrong in the agency's conducting an inquiry to re-evaluate its policy. Indeed, we would argue that the agency could properly come to the conclusion that its original policy was correct and attempt so to convince the court in future litigation.

Administrative agencies must be free to re-examine their policies in the light of new facts and judicial decisions. This should include the freedom to readopt a previous policy, as long as the determination to do so is made fairly, with an open mind on all the evidence and consistent with the courts' legal rulings as to the agency's powers under its organic statute, *Cf. Association of National Advertisers v. FTC*, — F. 2d —, 48 LW 2434 (D.C. Cir. Dec. 27, 1979).

The difficulty in the present case is that the record showed, in the view of the Court of Appeals, agency "aversion and "hostility" toward the Congressional policy embodied in petitioner FCC's organic statute which, as interpreted by this Court and the Court below, see pp. 16-21, *supra*, requires the agency to promote diversity of formats (610 F. 2d at 850; App. 21a) (McGOWAN, J.); (610 F. 2d at 860; App. 44a-45a) (LEVENTHAL, J., concurring). This error was compounded by "an almost cavalier disregard for the public's right to comment" (610 F. 2d at 858; App. 41a) (BAZELON, J., concurring in vacating the FCC's decision).

Amici Attorneys General submit, therefore, that if the issues of agency/court relations or of policy/statutory interpretation are reached, their resolution should be explicitly limited to the facts herein. The Court can condemn the unusual practices apparently followed by petitioner FCC without limiting the freedom of other administrative agencies following fair procedures and adhering to judicial precedent to re-examine their policies without being either mandated to change or foreclosed from adhering to prior policy.

tions. Some treat franchising power separately from regulatory power. Some place all authority at State level, others at local level and some place some authority at both levels. Some States lodge power in a utility commission, some in an office thereof, others in a separate agency. Some class cable as a public utility, but others do not, including some States that nonetheless use their utility commission to regulate cable. The extent of regulatory power and the standards under which the local regulators function are equally varied.⁵⁰

In analogous areas such as criminal and juvenile justice, where Federal jurisdiction is indirect and there is no Federal rule, where the matter is of local concern and is locally regulated, where the various States have adopted differing solutions to their problems, this Court has been "reluctant to disallow the States to experiment further and to seek in new and different ways" for answers. *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971) (juvenile justice). See also *McGinnis v. Royster*, 410 U.S. 263, 270 (1973) (parole). *Amici* Attorneys General respectfully submit that unless and until Congress acts to assert jurisdiction over cable, regulatory policies to encourage diversified cable programming suited to local needs should be limited only by the broad parameters of the First Amendment.

If the Court's decision herein turns on statutory construction of the Communications Act, it would have no necessary effect on State regulation under different statutes. Because both the factual question of how limited cable channels are, see p. 10 *supra*, and the legal question of how access to them is regulated, vary from State to State, see pp. 9-14, 28-9, *supra*, and nowhere are the same as

⁵⁰ For State-by-State discussions of the variety of regulatory systems, see Hochberg, *The States Regulate Cable: A Legislative Analysis of Substantive Provisions*, Publication P-78-4 (Harvard Univ. July 1978), pp. 9-17, 38-48, 59-61, 73-76; Briley, *Survey of Franchising and Other State Law and Regulation on Cable Television* (FCC 1976), *passim*.

for broadcast media, any Constitutional holdings herein on Federal regulation of radio might not properly apply to State regulation of cable television systems.

Unless this Court overturns its prior decisions, see *Point I supra*, to find consideration of format in licensing decisions always to be unconstitutional, amici Attorneys General respectfully submit that the Court should leave the States free to explore the various possible approaches for such regulation, see pp. 9-14, 23-4, 28-9 *supra*, by explicitly noting that its decision herein does not necessarily apply to cable.

CONCLUSION

The decision below should be affirmed.

Dated: New York, New York
August 29, 1980

Respectfully submitted,

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Question Presented

Does the Commission's *Policy Statement* Unlawfully Restrict the Right of Listeners to Be Heard on the Public Interest Benefits of Unique Radio Formats?

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Table of Authorities

Cases:

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Cosmopolitan Broadcasting Corp., 75 F.C.C.2d 423 (1980)	17
Deregulation of Radio, Docket No. 79-219, (September 27, 1979)	19
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WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), <i>cert. denied</i> , 409 U.S. 1027 (1972)	21, 22
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United States Constitution and Statutes:

United States Constitution	
First Amendment	20, 22
Communications Act of 1934	
47 U.S.C. § 309(d)	13, 20

Other Authorities:

Barnouw, Erk, <i>A Tower of Babel</i> , New York, Oxford Univ. Press, 1966	15
Fed. Radio Comm. Ann. Rept. (1928)	16
Herring, E. Pendleton, "Politics and Radio Regulation," <i>Harvard Business Review</i> , Col. 13, No. 2, January, 1935	15
Kahn, Frank S., <i>Documents of American Broadcasting</i> , 3d ed., Prentice-Hall	16
Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio (November 9-11, 1925) ..	14

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IN THE
Supreme Court of the United States
October Term, 1979

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Petitioners,

-v.-

WNCN LISTENERS GUILD, INC. ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE SUBMITTED ON
BEHALF OF THE AMERICAN SYMPHONY
ORCHESTRA, AMERICAN SYMPHONY
ORCHESTRA LEAGUE, AMERICAN INTER-
NATIONAL ARTISTS LEAGUE, APPLE HILL
CHAMBER PLAYERS, ASSOCIATION OF
CONNECTICUT ORCHESTRAS, BOSTON
BLUEGRASS UNION, BOSTON SYMPHONY
ORCHESTRA & BERKSHIRE FESTIVAL,
THE CANTICUM NOVUM SINGERS, CARNEGIE
HALL CORPORATION, CENTRAL CITY OPERA
HOUSE ASSOCIATION, CHAMBER MUSIC
SOCIETY OF LINCOLN CENTER,
CONNECTICUT ADVOCATES FOR THE ARTS,
DALLAS CIVIC OPERA, THE DESOFF
CHOIRS, EMERSON STRING QUARTET,
GREENWICH PHILHARMONIA ORCHESTRA,

HOUSTON GRAND OPERA, JAZZ COALITION,
 INC., JAZZMOBILE INC., KNOXVILLE
 SYMPHONY ORCHESTRA, KODALY CENTER
 OF AMERICA, LINCOLN CENTER FOR THE
 PERFORMING ARTS, LIVING FOLK RECORDS
 AND CONCERTS, INC., LOS ANGELES
 MOZART ORCHESTRA, LOS ANGELES
 PHILHARMONIC ASSOCIATION &
 HOLLYWOOD BOWL SUMMER FESTIVAL,
 METROPOLITAN OPERA ASSOCIATION,
 MUSIC ASSOCIATES OF ASPEN, INC.,
 NANTUCKET MUSICAL ARTS SOCIETY,
 NEW ORLEANS JAZZ CLUB OF NORTHERN
 CALIFORNIA, NEW YORK CHORAL SOCIETY,
 NEW YORK CITY OPERA, NEW YORK
 PHILHARMONIC, OPERA COMPANY OF
 BOSTON, OPERA NEW ENGLAND, ORATORIO
 SOCIETY OF NEW YORK, PHILADELPHIA
 ORCHESTRA, PHILADELPHIA STRING
 QUARTET, ROBIN HOOD DELL CONCERTS,
 INC., ROUNDER RECORDS, ST. CECILIA
 CHORUS, SALT LAKE MORMON TABERNACLE
 CHOIR, SAN DIEGO SYMPHONY ORCHESTRA,
 SAN FRANCISCO SYMPHONY ORCHESTRA,
 SANTA FE CHAMBER MUSIC FESTIVAL,
 SEATTLE OPERA ASSOCIATION & PACIFIC
 NORTHWEST WAGNER FESTIVAL,
 SKYLIGHT COMIC OPERA LTD,
 UNIVERSAL JAZZ COALITION

Interest of Amici

Amici are a large group of disparate musical-arts organizations who share in common a passion for the preservation and growth of musical forms, which are among the most important components of America's cultural heritage. They range from the most prestigious and influential classical music organizations in this country and in the world (e.g., Lincoln Center for the Performing Arts, the Metropolitan Opera, Carnegie Hall Corporation, New York, the Los Angeles Philharmonic, the Philadelphia Orchestra, and the Salt Lake Mormon Tabernacle Choir) to small groups of performers (e.g., Apple Hill Chamber Players, Nantucket Musical Arts Society) to associations for the promotion and preservation of peculiarly American music (e.g., Boston Bluegrass Coalition, New Orleans Jazz Club of Northern California).

Whether, like the Houston Grand Opera, they reach listeners and viewers in the millions,¹ or, like the Jazzmobile, play in the streets and the parks for largely economically disadvantaged audiences,² they depend on radio as a major means not only of publicizing their performances, but as a way of reaching out to people who have little or no previous contact with, or knowledge of, music outside the commercial, popular sphere. Radio is a major means of audience

¹During a single season, the Houston Grand Opera has audiences of 3 million attending 358 performances. An additional 10-12 million radio listeners hear weekly performances over a 300-station national network.

²Jazzmobile, a sixteen year old New York organization, produces free outdoor summer concerts in many New York neighborhoods and conducts jazz education workshops.

building for diverse kinds of music,³ groups of musicians,⁴ and individual careers.⁵ Audiences are necessary to the survival of many forms and varieties of music which might otherwise be lost or forgotten, immeasurably impoverishing our traditions and our lives.⁶ And audience building, for these and similar organizations, is a two-way street. Hearing opera, bluegrass, symphonic music or jazz on the radio not only encourages people to attend live performances, with all the attendant benefits to society which that provides,⁷ it also provides a singular and unduplicatable source of such music for persons who, for many

³For example, Chamber Music America credits classical music stations for expanding the number of people attending chamber music concerts and estimates that the audience for chamber music is now some 8,000,000 people. Living Folk Records and Concerts, Inc. believes that without the support of radio stations that play folk music and interview performers much of this fine tradition would be lost to the public.

⁴The Greenwich Philharmonia Orchestra, for example, has found that when people listen to music on the radio, they begin to go to concerts, and music becomes part of their lives.

American International Artists, a classical musician management organization, has found that without classical music stations, classical musicians lose access to the listeners which musicians in other fields almost automatically have over the radio. The Universal Jazz Coalition has found the same to be true of jazz musicians.

⁵Audience building is also frequently a prerequisite to that government financial aid which guarantees the survival of many musical organizations. The National Endowment for the Arts, for example, frequently looks to see whether particular organizations are able - through radio broadcasts - to reach greater audiences than those actually attending performances as a prerequisite of funding grants.

⁶Music supports the general economy rather than depletes it. In New York City, the arts generate \$4.5 billion a year in expenditures and receipts through such peripheral business as hotels, restaurants, shopping and other activities. *New York Times*, April 1, 1980, p. 31. Music is a major tourist attraction in many cities.

⁷Concert halls and musical centers have had profound impacts on the neighborhoods in which they are located. For example, property values in the Lincoln Center area have risen dramatically since it was opened in 1962. Amicus Connecticut Advocates for the Arts, a non-profit lobbying organization, estimates that every dollar spent in the arts returns 2.5 dollars to the community.

reasons, including age, disability or poverty, cannot attend live performances.⁸

In a more uplifting analogy to the way that popular entertainment formats are "bait" to obtain audiences for advertisers, specialized music and arts formats provide a means for reaching a particular audience which wants to know about coming cultural events, concerts, hear and preview new recordings, etc.⁹ Where the specialty station is the only one of its kind - i.e., where it offers a *unique* format - its disappearance may deprive those organizations of their most effective, if not their only means of communication with their audiences and admirers,¹⁰ creating a ripple effect with public interest implications far beyond even the loss of the format itself.

All of the amici want and need to use radio to communicate their various but enormously significant messages. All have "messages," whether aesthetic or informational, or both, of high value to listeners and to society as a whole. None, however, are licensees of broadcast stations - not because they eschew such a role, but because no licenses are available where they are located. The spectrum scarcity rationale

⁸See, for example, two very moving letters, one from an elderly retired couple, one from a recuperating patient in a mental hospital, which were attached as Exhibits to the Comments of the WNCN Listeners Guild in the Inquiry below. Joint Appendix in the D.C. Circuit, pp. 226, 227. These provided limited but eloquent testimony to the virtually life-and-death importance that the access to good music has for many disadvantaged Americans.

⁹For example, the Boston Bluegrass Union depended upon the country music format of Cambridge Station WCOP to reach and build an audience for its beloved bluegrass music and the non-profit concerts it promoted in the Boston area.

¹⁰This is why a number of these cultural organizations have been involved in struggles to save unique formats. For example, the Association of Connecticut Orchestras supported the citizens group to save WTIC-FM, Connecticut's only classical music station; the Boston Bluegrass Union supported WCOP; and the New Orleans Jazz Club of Northern California fought to save San Francisco's Big Band radio station KMPX.

for public interest regulation of the broadcast spectrum is here made concrete. Many who wish to "speak" may not, except by the sufferance of those few who, by virtue of their licenses, would monopolize the airwaves but for the public interest standard of the Act.

For all of these, the reasons discussed *infra* and in the brief of the Respondents,¹¹ amici urge this Court to affirm the decision below requiring the FCC to follow statutorily required procedures, enforce the trusteeship concept, and regulate in the public interest, especially where the loss of a unique format is at stake.

Descriptions of the amici follow, in alphabetical order:

The American Symphony Orchestra, founded in 1962 by Leopold Stokowski, is the only major ensemble in the United States which is governed by the musicians themselves; it is a major musical resource which serves a wide range of audiences in the New York area, in part by performing free concerts in parks and community areas.

American Symphony Orchestra League is an organization which lobbies for and represents the professional interests of over 770 orchestras in the United States.

American International Artists is a concert artist management organization which seeks to promote the highest quality in classical music performance.

¹¹ Amici here adopt by reference all arguments made in the brief of Respondents WNCN Listeners' Guild, Inc., *et al.*

Apple Hill Chamber Players is a performing ensemble of nine permanent members who live and work at Apple Hill Farm in Nelson, New Hampshire; they perform 100 concerts a year throughout the United States and encourage the participation and enjoyment of amateur musicians at every skill level.

The Association of Connecticut Orchestras is a non-profit association of 22 orchestras, 8 youth orchestras plus other performing groups and individuals; its purpose is to encourage, promote and mutually assist the development and needs of orchestras throughout the state.

The Boston Bluegrass Union is devoted to the promotion and preservation of traditional and modern bluegrass music and presents approximately seven concerts a year in the Boston area.

The Boston Symphony Orchestra is the second oldest symphony orchestra in the United States. The Berkshire Festival, the Orchestra's summer home in Lenox, Massachusetts, is perhaps the world's finest summer music festival and school. Its extensive recordings and its live concerts are broadcast to millions of listeners across the country.

The Canticum Novum Singers is a choral organization which performs regularly in major New York City concert halls. Their concerts have been broadcast many times and they are particularly aware of the importance of radio to artist and audience.

Carnegie Hall is a presenter of concerts as well as one of the world's foremost platforms for concert attractions. The 1980-81 season will celebrate Carnegie Hall's 90th anniversary as an outstanding cultural institution of national and international stature.

The Central City Opera House Association is a producer of professional opera performances in Central City, Colorado and a prime source of live classical music in that part of the Western United States.

Chamber Music America is a national membership service organization founded in 1977 to advance the interests of chamber music.

The Chamber Music Society of Lincoln Center is the resident chamber music constituent of Lincoln Center. It performs 75 concerts annually in New York and around the country. Hundreds of thousands of radio listeners hear its Sunday afternoon concerts live over Radio Station WNCN-FM.

Connecticut Advocates for the Arts promotes and assists non-profit art organizations in Connecticut through coordinated public action and political education.

The Dallas Civic Opera, which has established a reputation as one of the leading international opera companies, presents operatic performances to the Dallas public.

The Desoff Choir has played an influential role in broadening the repertory of choral music throughout the United States and Europe by its pioneering performances of works from the Medieval, Renaissance and Baroque periods.

The Emerson Quartet is a group of exceptionally gifted young musicians who have performed throughout the United States and Canada.

The Greenwich Philharmonia Orchestra is a locally based symphony orchestra of 85 professional musicians, drawn principally from Fairfield County, Connecticut and from Westchester, County, N.Y. and New York City.

The Houston Grand Opera has 11,400 annual subscribers and during a single season has audiences of 3 million attending 358 performances throughout the United States and Europe. An additional 10-12 million radio listeners hear weekly performances over a 300-station national network of commercial and non-commercial stations.

Jazz Coalition Inc. is a membership organization which works to stimulate a vital jazz scene through service to musicians and the music community of greater Boston. They produce jazz concerts and sponsor educational programs.

Jazzmobile Inc. is a New York organization dedicated to the preservation, propagation and appreciation of jazz. They produce concerts and conduct jazz education workshops.

The Knoxville Symphony Orchestra is classed by the American Symphony Orchestra League as a Metropolitan Orchestra because of its \$400,000.00 budget.

The Kodaly Center of America is an organization designed to deliver the Kodaly concept of music education to teachers, performers and children in public and private institutions throughout the United States.

Lincoln Center for the Performing Arts, Inc. is New York's, and one of the world's, finest performing arts center. Constituent organizations within Lincoln Center include the New York Philharmonic, Metropolitan Opera, Julliard School, Library and Museum of the Performing Arts, New York City Ballet, New York City Opera, Chamber Music Society of Lincoln Center, and Film Society of Lincoln Center.

Living Folk Records and Concerts Inc. is a non-profit organization that has produced folk music records and promoted folk music concerts in the Boston/Cambridge area for the past ten years.

The Los Angeles Mozart Orchestra is a professional chamber ensemble which was founded in 1974.

The Los Angeles Philharmonic, an orchestra of international reputation, broadcasts its concerts weekly to over 200 radio stations via National Public Radio's satellite system. An October 1978 performance was telecast live by satellite and seen by an audience of 30 million in the United States and Europe.

The Metropolitan Opera, one of the world's premier opera companies, broadcasts its performances to over 10 million listeners on over 300 commercial and non-commercial radio stations in the United States. The Public Broadcasting System telecasts four or five "Live from the Met" programs a season.

Music Associates of Aspen, Inc. sponsors the Aspen Music Festival and Aspen Music School, probably the foremost summer institution for advanced musical study in the world.

The Nantucket Musical Arts Society has for 22 years brought a rich variety of chamber groups and soloists to Nantucket, Massachusetts every July and August. They also run the island's only music school, which trains students from kindergarten through high school.

The New Orleans Jazz Club of Northern California is dedicated to the education, preservation and promotion of traditional jazz. They print a monthly newsletter.

The New York Choral Society is a performing organization with 200 singing members. It presents an annual series of concerts at Carnegie Hall.

The New York City Opera was organized in 1944 to present the highest quality opera to audiences at the lowest possible prices. Radio station WNCN-FM has broadcast 10 live performances over the past two years, and also broadcasts an annual "Operathon" to attract new subscribers.

The New York Philharmonic is the oldest symphonic organization in the United States and has played a leading role in American musical life and development. Weekly radio concerts of the Philharmonic are heard on over 250 commercial and non-commercial radio stations in the U.S. and Canada. The Philharmonic utilizes the facilities of Radio Station WQXR for a yearly fund raising and subscription drive.

The Opera Company of Boston is a cultural institution in the City of Boston and one of the United States' leading opera companies.

Opera New England, an offshoot of the Opera Company of Boston, brings opera to thousands of school children in four New England states. These operas are specially staged for children.

The Oratorio Society of New York, the second oldest musical organization in New York City, is a chorus which has presented many American premieres and commissioned works by distinguished companies.

The Philadelphia Orchestra, until this year under the baton of Maestro Eugene Ormandy, is world renowned not only for its spectacular concerts, but for its many and varied recordings, which have been heard over radio stations across the country and around the world.

The Philadelphia String Quartet, which is in residence at the University of Washington, is world renowned and has toured extensively in Europe, South America and the Far East.

Robin Hood Dell Concerts, Inc. is the summer home of the Philadelphia Orchestra. On its fiftieth anniversary in 1979, President Carter stated that "The Dell has made invaluable contributions to the cultural vitality of the City of Philadelphia and . . . has been a model for the Nation and the world for voluntary partnerships between private citizens and local government."

Rounder Records is a major independent record company, which manufactures and distributes acoustic and folk music records.

The St. Cecilia Chorus has approximately 160 singers and has presented the classic choral repertoire, less familiar works of the masters, and United States and world premieres of more than 58 contemporary works. Many of its performances have been broadcast.

The Salt Lake Mormon Tabernacle Choir broadcast its first choir program in 1929. Today, it is the oldest continuous radio program on national networks, carried by 68 television and 355 radio stations in the United States and Canada. It is carried by shortwave to many parts of the world and more than 800 radio and television stations worldwide release the program weekly.

The San Diego Symphony is California's largest regional orchestra; it provides Southern California with 100 concerts a year.

The San Francisco Symphony serves a community of approximately 450,000 with a permanent subscription list of over 20,000. It is the only major orchestra in Northern California. Broadcasts of its performances are played on 31 radio stations across the U.S.

The Santa Fe Chamber Music Festival presents an ever-increasing range of chamber music to New Mexicans and actively commissions new works. Its concerts now take place not only in Santa Fe, but in Seattle and New York City. The Festival's last two seasons have been broadcast live.

The Seattle Opera Association and Pacific Northwest Wagner Festival is the largest arts organization in the Pacific Northwest. Each year they present a full season of five works, with six performances each, four in the original language and two in English translation. Seattle Opera performances are regularly broadcast to national audiences.

The Skylight Comic Opera presents light opera, operetta, vintage musical comedy, modern opera and works for the musical theatre not generally included in the standard repertory.

The Universal Jazz Coalition assists jazz artists, both established and emerging, with low cost public relations and promotion and with advice on concert production and career guidance. The Coalition produces

concerts, seminars, workshops, conferences and publishes a jazz catalogue, newsletter and monthly calendar.

POINT I

The Policy Statement Unlawfully Restricts the Hearing Rights of Listeners Under Section 309(d) of the Communications Act

In *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), it was held that television viewers had standing to file a petition to deny renewal of a television station license under Section 309(d) of the Act and to obtain a hearing on complaints that the station's program service was deficient in various respects which would preclude the necessary finding that renewal would serve the "public interest, convenience and necessity." The Commission did not seek reargument or review of this decision and repeatedly cited it in subsequent decisions. It has been cited at least eight times in opinions of this Court.

Nothing in the opinion or in the Act itself suggests that the Commission may, for reasons of administrative convenience or otherwise, narrow or curtail the right of responsible public groups to question the quality of a station's service or its responsiveness to local needs in a renewal proceeding or any other licensing proceeding requiring a public interest finding. Thus, the narrow question in this case is whether the Commission can properly determine as a result of a general and abstract inquiry that in no conceivable case can any public group ever succeed in demonstrating that a change in radio program formats is contrary to the public interest.

More precisely, because the ultimate burden of proof is on the licensee (See *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969)), the question is whether all radio program formats are conclusively presumed to be in the public interest without regard to public reaction.¹² No party contends or has ever contended that the Commission should undertake the comprehensive regulation of all radio program formats.

The public interest standard as enacted in 1927 and reenacted in 1934 included as its primary element the provision of a program service which is responsive to a broad spectrum of public tastes, needs and interests. The legislative history indicates that commercial incentives could not be relied upon to provide this kind of service. See, e.g., the statement of Secretary of Commerce Herbert Hoover that "no one can raise a cry of deprivation of free speech if he is compelled to prove that there is something more than naked commercial selfishness in his purpose."¹³

The Federal Radio Commission was formed in March 1927 and immediately began a comprehensive reassignment of the broadcast spectrum giving preferential treatment to stations engaged in general public service and assigning less desirable channels and hours to stations operated by educational institutions, churches, unions and other so-called "propaganda" stations. During this period "Connecticut State College

¹²Some formats, e.g. religious, are not even tested by the need to sell time to advertisers.

¹³*Proceedings of the Fourth National Radio Conference and Recommendations for Regulation of Radio*. Conference called by Herbert Hoover, November 9-11, 1925, Washington, D.C., G.P.O., 1926, p. 1.

was shifted nine times, another educational station was shifted nine times, two others seven times and four others six times."¹⁴

At the hearings preceding the 1934 Act, the National Association of Broadcasters advised the House Committee that it was the "manifest duty" of the Radio Commission to examine a licensee's program service in renewal proceedings, and that the provision of programs "concerned with human betterment" was the "principal test" applied by the Commission in making assignments in the previous seven years.¹⁵

The policy of assuring service to all tastes was explained by the Radio Commission in the *Great Lakes Statement*:

"The entire listening public within the service area of a station, or a group of stations in one community, is entitled to service from that station or stations. If, therefore, all the programs transmitted are intended for, and interesting or valuable to, only a small portion of that public, the rest of the listeners are being discriminated against. This does not mean that every individual is entitled to his exact preference in program items. It does mean, in the opinion of the Commission, that the tastes, needs and desires of all substantial groups among the listening public should be met, in some fair proportion, by a well-rounded program, in which entertainment, consisting of music of both classical and lighter grades, religion, education and instruction, important public events, discussions of public questions,

¹⁴Herring, E. Pendleton, "Politics and Radio Regulation," *Harvard Business Review*, Col. 13, No. 2, January 1935, pp. 167-178, 172; Barnouw, Erik, *A Tower in Babel*, New York, Oxford Univ. Press, 1966, p. 260.

¹⁵Hearings on HR 8301, 73rd Cong., p. 117.

weather, market reports and news and matters of interest to all members of the family find a place."¹⁶

A number of the most profitable radio stations in the nation are operating on radio frequencies obtained during the 1928-1934 period by promises to provide program service responsive to a wide spectrum of public needs. As the Commission stated in the Blue Book,

"It has long been an established policy of broadcasters themselves and of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time."

Dr. Frank Stanton of CBS was quoted as testifying:

"It is known that the New York Philharmonic Symphony Orchestra, the Columbia Work Shop, Invitation to Learning, Columbia Broadcasting Symphony and many other ambitious classical programs never reach the largest audience, but Columbia, nonetheless, puts them on year after year for minorities which are growing steadily."¹⁷

While it is true that the Commission did not order broadcasters to adopt particular formats, the Commission did in 1927-34, and does today, regularly designate meritorious programming issues in renewal proceedings at the request of broadcast applicants.¹⁸

¹⁶2 Fed. Radio Comm. Ann. Rept. at 166 (1928) quoted in Kahn, Frank S., *Documents of American Broadcasting*, 3d ed. at 152, Prentice-Hall, Englewood Cliffs, N.J.

¹⁷*Id.* at 163.

¹⁸*Medford Broadcasters, Inc.*, 18 F.C.C.2d 817, 818 (1969); *Midwest Radio Television, Inc.*, 18 F.C.C.2d 1011, 1014 (1969).

Many incumbent licensees have relied on the superiority of their program service to defeat competing applicants.¹⁹ The Commission appears to have little difficulty deciding in these cases questions which the *Policy Statement* argues are hopelessly complex. For example, it recently decided that the foreign language programming of Station WHBI-FM in Newark was not "unique" and therefore did not aid the licensee in a meritorious programming issue.²⁰

Until recently, the Commission has never indicated that it doubted its responsibility to assure that radio formats contributed to overall diversity of service. Thus, until recently, the Statement of AM or FM Program Service, included in the Commission's license renewal application form,²¹ contained these questions:

"17. Describe the applicant's proposed programming format(s), e.g., country and western music, talk, folk music, classical music, foreign language, jazz, standard pops, etc., and the approximate percentage of time per week to be devoted to such format(s).

18. State how and to what extent (if any) applicant proposes to contribute to the overall diversity of program services available in the area or communities to be served."

The answers to these questions were treated as binding representations for the term of the license. A licensee who proposed to change format in mid-term was required to advise the Commission and justify the change in terms of overall diversity of service. It is true, of course, that these changes pre-

¹⁹See e.g., *WPIX, Inc.*, 68 F.C.C.2d 381 (1975).

²⁰*Cosmopolitan Broadcasting Corp.*, 75 F.C.C.2d 423, 425 (1980).
FCC Form 303, Section IV(a).

capitated little, if any, Commission action, but that is understandable. The Commission has virtually no field staff other than technicians. The Broadcast Bureau in Washington cannot be expected to investigate and judge the responsiveness of program service to local needs without the aid of concerned parties. Thus it was not until the *United Church* case that such issues were taken up in the context of license renewal and transfer proceedings. When the unique format issue arose in *Atlanta*,²² it was not new. It had been routinely designated in hearings upon application of license applicants. The element that was new was designation at the request of *public groups* and, perhaps, the fear that the Commission's processes would be overborne by a horde of disgruntled devotees of one or another format.

We are brought back to the Court's wise words in *United Church*:

"The fears of regulatory agencies that their processes will be inundated by expansion of standing criteria are rarely borne out." (359 F.2d at 1006.)

Sensitive to the Commission's fear, the Circuit Court has itself erected more severe barriers to public participation in format cases than in others. Thus, it is not enough that an individual or a responsible group be concerned. There must be "significant public grumbling." In the decided cases this has often involved resolutions and statements of legislative bodies and important public officials and wide participation of public groups. Thus the Court has given full weight to

"... our national tradition that public response is the most reliable test of ideas and performance in broadcasting as in most areas of life[and to] the Commission view ... that we have traditionally

²² *Citizens Committee v. FCC*, 436 F.2d 263 (D.C. Cir., 1970).

depended on this public reaction rather than on some form of governmental supervision or 'censorship' mechanism." (*Id.* at 1003.)

The Commission, on the other hand, would designate meritorious programming issues only at the instance of licensees and usually as a shield against license challenges.²³ In the light of the Commission's repeated consideration of meritorious program service during the 1928-1934 period, Congress must have intended that to be embraced within the public interest standard. It could not have contemplated that meritorious programming be included in the public interest standard at the sole option of the licensee. Any such interpretation would deprive listeners of their rights as parties in interest under Section 309(d).

²³ In *Deregulation of Radio*, Docket No. 79-219, *Notice of Inquiry and Proposed Rulemaking*, released September 27, 1979, the Commission has proposed that consideration of programming be barred in renewal proceedings, except as follows:

"Under an alternative proposal arising with respect to comparative renewal proceedings, an incumbent licensee might be allowed to voluntarily ask for Commission consideration of its nonentertainment programming or of its entertainment programming as a basis for finding that the licensee's past service is sufficiently meritorious to overcome a challenger's advantages on other grounds. In considering this alternative proposal, we again want to emphasize that our fundamental goal is service to the public. The courts have recognized that both nonentertainment programming²⁴ and entertainment programming²⁵ can meet public needs.

²⁴ *E.G. Office of Communication of United Church of Christ v. FCC*, 359 F.2d at 994.

²⁵ *E.G. Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917, 931 (D.C. Cir. 1978)."

POINT II

The Policy Will Unlawfully Preclude the Commission from Taking a "Hard Look" at First Amendment Claims by Public Intervenors

This Court has noted that:

"It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."²⁴

The Court has also made clear that the listener's First Amendment rights are not limited to public questions or even to speech but include significant cultural expression:

"It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (*Id.*)

Moreover, the decision holds that this balance can be compelled even when no one will pay for the time.

Thus format petitions by public groups present clear First Amendment claims. They involve directly the ultimate First Amendment objective of culturally diverse service. Public parties seeking to present these claims are the persons whose rights to cultural diversity are in jeopardy.

The conditions which public intervenors must meet to establish materiality under Section 309(d) of the Act as interpreted by the Court of Appeals (i.e. proof of uniqueness, public demand and commercial

viability) are restrictive, and few cases are likely to arise, much less go to hearing.²⁵

To obtain a hearing, public intervenors would be compelled to show that the prediction upon which the Commission's new policy is based (i.e., that commercial incentives will usually serve all significant minority tastes) has failed in practice. Thus the interpretation of 309(d) adopted by the Court of Appeals can be viewed as simply a specialized application of the hard look doctrine outlined in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

In that case, a daytime station in Chicago sought a waiver of the FCC's clear channel rule which prohibited it from operating at night. It alleged that its programming of "good" music and forum discussions on matters of public interest was a unique AM service and that its night time signal would be directionalized and would not interfere with the clear channel signals in the sparsely populated "white" areas which the clear channel stations were intended to serve. The Commission rejected the request for waiver on the sole ground that its rule would be violated. The Court conceded that, "An applicant for waiver faces a high hurdle even at the starting gate." But it noted that "the agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." The Court did not think it necessary to consider to what extent the overbreadth principle of First Amendment cases enlarged the Commission's

²⁵We know of only one hearing in a format case resulting from a public petition to deny, and none which went to a final decision by the Commission. Often the controversy over loss of a valued format produces such an outpouring of loyalty and advertiser interest that the licensee readily agrees to maintain the format on at least a part-time basis or another licensee agrees to serve that program taste.

²⁴*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

duty to consider waivers, but it held that "the manifest importance of the subject matter" required a "hard look."²⁶ *WAIT* has since been followed by the Commission and has been cited in more than 50 decisions.

Unless the Commission's new policy is more absolute than a formal rule, the very grounds which required a hearing in *WAIT* would require a hearing in format cases, i.e. the prima facie showing that a unique and culturally valuable service was at stake and that the presumptions upon which the general rule is based had failed in practice. Under the *Policy Statement* the persons whose First Amendment rights are "paramount", i.e., the listeners who wish to preserve unique, diverse and culturally valuable program services, would be the only parties who could not be heard.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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²⁶Upon remand the Commission considered the application on its merits and found sufficient dangers to the public interest in the proposed waiver to justify denial. The Court affirmed.

Question Presented

Whether the Court of Appeals was correct in setting aside the Federal Communications Commission's *Policy Statement* on Entertainment Formats where

A. in accordance with § 706(C) of the Administrative Procedure Act, it found that the *Policy Statement* violated § 309(e) of the Communications Act of 1934, because the Commission there unequivocally refused to carry out its statutorily mandated obligation to consider the effects of loss of diversity on the public interest, in deciding to grant or deny transfer or renewal applications where a unique, financially viable entertainment format would be lost, and where the Commission totally abdicated that choice to the marketplace even though agreeing that programming diversity is in the public interest, and that the marketplace sometimes fails,

and/or

B. in accordance with § 706(A) of the Administrative Procedure Act, it found the *Policy Statement* arbitrary and capricious, and lacking rationality and impartiality because

1. it was based on fears of an "administrative nightmare" for which there was no record or historical support, and which the Commission itself subsequently disavowed; and
2. it was based on a complete exaggeration and misreading of the court's prior format cases; and
3. it was the result of the Commission's failure to seek ways to implement the court's binding explication of the statutory mandate, and its hostility to the court's decisions and to the listener groups who attempted to enforce them; and

4. it relied heavily on material which was never made available for public comment, analysis or rebuttal, and which was not supportive of the conclusions which the Commission drew from it;

and/or

- C. it found, pursuant to § 706 of the Administrative Procedure Act, and its primary obligation to interpret the Constitution, that the procedural, statutorily mandated procedures it had set forth in its format decisions did not violate the First Amendment, and were indeed necessary to guarantee the "paramount" rights of listeners and viewers, protected by the First Amendment.

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Table of Authorities

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Alabama Educational Television Commission, 33 F.C.C.2d 495 (1971), <i>renewal denied</i> , 50 F.C.C.2d 461 (1975)	8
Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979)	41
Aqua Slide 'N' Dive Corp. v. Consumer Product Safety Commission, 569 F.2d 831 (5th Cir. 1978)	42
Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945)	4, 6, 33, 54, 62, 70
Associated Press v. United States, 326 U.S. 1 (1945)	83
Bigelow v. Virginia, 421 U.S. 809 (1975)	78
Biola Schools & Colleges, Inc., 29 F.C.C.2d 787 (1971)	85
Buckley v. Valeo, 424 U.S. 1 (1976)	78
Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958)	5, 65, 68
Central California Communications Corp., 70 F.C.C.2d 1947 (1979)	8
Central Florida Enterprises, Inc. v. FCC, 598 F.2d 37 (D.C. Cir. 1978), <i>cert. dismissed</i> , ____ U.S. ____, 99 S.Ct. 2189 (1979)	7
Channel 20, Inc., 70 F.C.C.2d 1770 (1979)	8
Charles A. Haskell, 36 F.C.C.2d 78 (1972), <i>aff'd. sub nom. Lakewood Broadcasting Service, Inc. v. FCC</i> , 478 F.2d 919 (D.C. Cir. 1973)	14

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Citizens Committee to Keep Progressive Rock (WGLN-FM) v. FCC, 478 F.2d 926 (D.C. Cir. 1973)	14, 15, 56, 57
Citizens Committee to Preserve the Present Programming of WONO (FM) v. FCC, No. 71-1336 (D.C. Cir. May 13, 1971)	14, 15
Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM & FM) v. FCC, 436 F.2d 263 (D.C. Cir. 1970) 13, 45, 57, 60, 64	
Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (<i>en banc</i>)	<i>passim</i>
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Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971)	33
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971)	29, 34
City of Chicago v. FPC, 458 F.2d 731 (D.C. Cir. 1971)	39
Columbia Broadcasting System, Inc. v. Demo- cratic National Committee, 412 U.S. 94 (1973)	5, 24, 67, 75, 78, 82, 84
Commercial Radio Institute, 47 RAD REG. 2d (P&F) 1307 (Rev. Bd. 1980)	71
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FCC v. National Citizens Committee for Broad- casting, 436 U.S. 775 (1978)	17
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	84, 86
FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940)	31, 79
FCC v. RCA Communications, Inc., 346 U.S. 86 (1953)	4, 30, 63, 66
FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940)	4, 5, 52, 64, 65, 66, 68
Flint Family Radio, 69 F.C.C.2d 38 (Rev. Bd. 1977)	9, 38
George E. Cameron Jr. Communications, 71 F.C.C. 2d 460 (1979)	9, 10, 38, 62, 70
Glenkaren Associates, Inc., 14 RAD.REG. 2d (P&F) 104 (1968), <i>reconsideration denied</i> , 19 F.C.C.2d 13 (1969), <i>rev'd sub nom.</i> Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM & FM) v. FCC, 436 F.2d 263 (D.C. Cir. 1970)	57, 58
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1971), <i>cert. denied</i> , 403 U.S. 923 (1971)	7
Hartford Communications Committee v. FCC, 467 F.2d 408 (D.C. Cir. 1972)	15
Henry v. FCC, 302 F.2d 191 (D.C. Cir. 1962)	87

Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), <i>cert. denied</i> , 434 U.S. 829 (1977)	39, 51
International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973)	51
International Radio, Inc., 45 RAD. REG. 2d (P&F) 173 (1979)	9, 38
Kaiser Broadcasting Corp., 45 F.C.C.2d 601 (1974)	85
Koeth Broadcasting Co. Inc., 40 F.C.C.2d 534 (1973)	85
Lakewood Broadcasting Service, Inc. v. FCC, 478 F.2d 919 (D.C. Cir. 1973)	15
Lemon v. Kurtzman, 403 U.S. 602 (1971)	24, 61
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	77, 78
Mid-South Broadcasting Corp., 44 F.C.C.2d 981 (1973)	85
Midwestern Broadcasting Co., 42 F.C.C.2d 1091 (1973)	85
Mississippi Authority for Educational TV, 71 F.C.C.2d 1296 (1979)	8
Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973)	51
Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971)	81
National Association of Theatre Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), <i>cert. denied</i> , 397 U.S. 922 (1970)	32
National Broadcasting Co. v. United States, 319 U.S. 190 (1943)	<i>passim</i>
National Broadcasting Co. v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942), <i>aff'd</i> , 319 U.S. 190 (1943)	80

National Broadcasting Co., Inc., 39 F.C.C.2d 400 (1973)	85
Newhouse Broadcasting Corp., 77 F.C.C.2d 97 (1980)	86
Northern California Black Christian Group, 45 F.C.C.2d 505 (1974)	85
Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)	<i>passim</i>
Office of Communication of United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969)	19, 22, 35
Office of Communication of United Church of Christ v. FCC, 560 F.2d 529 (2d Cir. 1977)	7
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	33
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972)	78
Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), <i>cert. denied</i> , 417 U.S. 921 (1974)	51
Post-Newsweek Stations, 57 F.C.C.2d 326 (1975)	85
Rebel Broadcasting Co. and Tri-Cities Broadcasting Co., 40 F.C.C.2d 619 (1973)	85
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	<i>passim</i>
Renaissance Broadcasting Corp., 75 F.C.C.2d 441 (1980)	9
Republic Broadcasting Corp., 57 F.C.C.2d 336 (1975)	85
Riverside Broadcasting Co., Inc., 64 F.C.C.2d 866 (1977)	85

RKO General, Inc., 23 RAD. REG. 2d (P&F) 930, <i>aff'd sub nom.</i> Hartford Communications Committee v. FCC, 467 F.2d 408 (D.C. Cir. 1972)	14
Rust Communications Group, 73 F.C.C.2d 39 (1979)	7
Salter Broadcasting Co., 8 F.C.C.2d 1036 (Rev. Bd. 1967)	9
South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974)	51
Stockholders of Rust, 64 F.C.C.2d 883 (1977)	85
Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969)	32
Television Corporation of Michigan v. FCC, 294 F.2d 730 (D.C. Cir. 1961)	89
Thunderbird Broadcasting Co., 61 F.C.C.2d 1190 (1976)	85
Tri Cities Broadcasting Co., 42 F.C.C.2d 499 (1973)	85
TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), <i>cert. denied</i> , 419 U.S. 986 (1974)	7
Twin States Broadcasting, Inc., 35 F.C.C.2d 969 (1972), <i>rev'd. sub nom.</i> Citizens Committee to Keep Progressive Rock (WGLN-FM) v. FCC, 478 F.2d 926 (D.C. Cir. 1973)	14, 15
UAW v. Scofield, 382 U.S. 205 (1965)	11
United States v. Midwest Video Corp., 406 U.S. 649 (1972)	32
United States v. Nova Scotia Food Products Corp., 568 F.2d 240 (2d Cir. 1977)	50
United States v. Southwestern Cable Co., 392 U.S. 157 (1968)	81

United States Lines, Inc. v. Federal Maritime Commission, 584 F.2d 519 (D.C. Cir. 1978) ..	51
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)	42, 50, 51, 52
WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969)	33, 55
Walter E. Webster, Jr., 43 F.C.C.2d 300 (1973)...	85
Ward L. Jones, F.C.C. 67-82, 32 Fed. Reg. 1062 (Jan. 28, 1967)	9
WCAB, Inc., 27 F.C.C.2d 743 (1971)	85
Whitney v. California, 274 U.S. 357 (1927)	91
Wichita-Hutchinson Co., 20 F.C.C.2d 584 (1969) .	73
Winters v. New York, 333 U.S. 507 (1948)	89
WNCN Listeners Guild v. FCC, 610 F.2d 838 (D.C. Cir. 1979)(<i>en banc</i>)	<i>passim</i>
Younger v. Harris, 401 U.S. 37 (1971)	88
Zenith Radio Corp., 38 F.C.C.2d 838 (1972), <i>reconsideration denied</i> , 40 F.C.C.2d 223 (1973), <i>rev'd. sub nom.</i> Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974)(<i>en banc</i>)	15, 58, 59, 64
Zenith Radio Corp., 56 F.C.C.2d 1095 (1975)	36
<i>Constitution and Statutes:</i>	
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47 U.S.C. § 309(e)	i, 14, 17, 54
47 U.S.C. § 310(d)	73
47 U.S.C. § 310(d)	5
47 U.S.C. § 326	86
47 U.S.C. § 402(b)	54
Code of Federal Regulations	
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47 CFR § 1.106(c)	47
47 CFR § 1.106(f)	47
Radio Act of 1927, ch. 169, 44 Stat. 1162	69
<i>Other Authorities:</i>	
Additional Views of Chairman Burch in Which Commissioners Robert E. Lee, H. Rex Lee, Reid, Wiley and Hooks Join	
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Brown, <i>Some Flavor to New Prime-Time Shows</i> , New York Times, Jan. 1, 1976	
	16

B. Schmidt, <i>Freedom of the Press vs. Public Access</i> , 244 (1976)	78
Center for Public Resources, <i>Radio Report: An Inquiry into the Potential for Expanding Diversity in Commercial Programming</i> (Markle Foundation 1979)	16
R. Coase, <i>British Broadcasting, A Study in Monopoly</i> (1950)	4
R. Coase, <i>The Federal Communications Com- mission</i> , 2 J.L. & Econ. 1 (1959)	4
Davis, <i>Administrative Law in the Seventies</i> (1976) § 601-1-1 (Supp 1977)	50
Davis, <i>Administrative Common Law and the Vermont Yankee Opinion</i> 1980, Utah L. Rev. 3 (1980)	43
E. Barnouw, <i>The Golden Web, A History of Broadcasting in the United States, Vol. II- 1933 to 1953</i> , 22 (1968)	72
E. Barnouw, <i>The Sponsor: Notes on a Modern Potentate</i> (1978)	16
FCC, <i>Public Service Responsibility of Broad- cast Licensees</i> (1946)	7, 69
Federal Radio Commission, <i>Second Annual Report</i> (1928)	69
H. Kelejian & W. Oates, <i>Introduction to Econo- metrics</i> , 92 (1974)	49
<i>Judicial Review of FCC Program Diversity Regulation</i> , 75 Colum. L. Rev. 401 (1975)	37
<i>Policy Statement on Comparative Broadcast Hearings</i> (1965)	70
<i>Program Policy Statement (En Banc Program- ming Inquiry)</i> 44 FCC 2303 (1960)	70

Stewart, <i>Vermont Yankee and the Evolution of Administrative Procedure</i> , 9, Harv. L. Rev.	51
Wall, <i>Section 309 of the Communications Act - The Renewal Provision - a Need for Change</i> , 25 Admin. L. Rev. 407 (1973)	37

Nos.: 79-824, 79-825, 79-826, 79-827

IN THE
Supreme Court of the United States
October Term, 1979

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
INSILCO BROADCASTING CORPORATION, ET AL.,
AMERICAN BROADCASTING COMPANIES, INC. ET AL.,
NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
Petitioners

-v.-

WNCN LISTENERS GUILD, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**JOINT BRIEF FOR RESPONDENTS WNCN
LISTENERS GUILD, INC., CLASSICAL RADIO
FOR CONNECTICUT, INC., ET AL., AND OFFICE
OF COMMUNICATION OF THE UNITED
CHURCH OF CHRIST, ET AL.**

Statement of the Case

Introduction

At the outset, it is critical to note what this case is *not* about. Despite distortions and exaggerations by the Commission and other parties, this is *not* a case about pervasive format regulation, nor about usurpation of an agency's policy-making authority by a reviewing court, nor about an agency's deter-

mination of the best way to implement its governing statute.

This case is, rather, about a blatant and unlawful attempt by the Federal Communications Commission to avoid doing exactly what the Communications Act of 1934 requires it to do - regulate in the public interest.

The Commission, in the *Policy Statement* here under review, has turned its back not only on clear statutory language mandating it to make public interest determinations in specified situations, but on 40 years of its own practice in administering a licensing scheme whose purpose is to maximize the fundamental public interest in diversity of programming.

While paying lip service to the importance of diversity and of service to minority tastes, the Commission has precluded the public from being heard on issues of vital concern to it; by holding that it will under no circumstances even "look" at the impact on diversity caused by the loss of a unique format, it has improperly and unlawfully carved out a content-based exception to the standing conferred on representatives of the public by Mr. Chief Justice (then Circuit Judge) Burger's holding in the *United Church of Christ* case.

By eschewing statutorily mandated regulation for a policy which defers completely to marketplace competition, the Commission has abandoned its obligation to make choices among licensees and potential licensees. Instead, it has abdicated that role to advertisers who determine what listeners it is most profitable for a broadcaster to reach. Such abdication of responsibility is not only clearly in violation of the Act, it is also profoundly anti-democratic, giving to those who have the power of the market, rather than those appointed by and responsible to elected officials, unbridled authority to determine what shall be heard, and who shall be served.

Casting its lot entirely with the marketplace, even while admitting that the marketplace sometimes fails, the Commission has violated its clear statutory obligation to make individualized determinations of the public interest, convenience and necessity.

Refusing to follow the statute, although repeatedly mandated to do so by the Court of Appeals, the Commission has violated both the principles of judicial supremacy and the separation of powers. It has, with no lawful authority, attempted to do unilaterally what Congress - although frequently so requested - has not seen fit to do: relieve it of the obligation to regulate.

The Court of Appeals, reviewing the *Policy Statement* and the *Inquiry* which produced it, has once again, consistent with the A.P.A. standard of judicial review, construed the Act and struck down the Commission's action as violative of its provisions. The court has not substituted its policy views for those of the Commission. Both agree that diversity is in the public interest; both agree that the marketplace generally promotes diversity.

The difference between the Commission and the court arises only in those situations where the marketplace fails. The Commission would do nothing; the court requires only that under limited conditions it must *consider* the loss of a unique format in deciding whether to grant a particular application.

The Commission need not necessarily grant a hearing; the existence of any of a number of undisputed facts may permit it to make its determination without one. The Commission need not necessarily grant or deny that application; the public interest determination is within its expert but principled discretion. What is not within the Commission's discretion is whether to make the public interest determination at all.

This is what this case is about, and on this basis the thoughtful and restrained opinion of the Court of Appeals must be affirmed.

Statement

A. The Regulatory Scheme

In 1927 Congress made a fundamental choice about how to deal with the rapidly developing, but still uncharted, electromagnetic spectrum. Of a number of possible models,¹ including pure competition for both allocations and frequencies, it selected public ownership of the broadcast spectrum and allocation and regulation of the use of radio frequencies² by a licensing system, *see, e.g., FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940) [*Sanders Bros.*].

While licenses were to be awarded to private entities, the public's ultimate, undivided ownership and paramount rights³ were guaranteed by a regulatory scheme based on the principles of licensee "trusteeship" for

It could, for example, have treated the spectrum like other resources such as land, gas, etc., and simply created property rights which could then have been disposed of like property rights in other resources. Such disposal could have resulted from one-time governmental action of selling, auctioning, or granting the rights to individuals or groups who were thereafter free to use or dispose of them in accordance with classic pricing mechanisms. This is the choice which certain neoclassical economists would prefer, *see, e.g., Coase, The Federal Communications Commission*, 2 J.L. & Econ. 1 (1959), but which they recognized did not occur. *See Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 335-36 (1945) (Frankfurter, J., dissenting) [*Ashbacker*]. Similarly, Congress could have followed the European model, retaining not only ownership of the broadcast spectrum, but direct control through creation of a nationalized broadcasting system. *See, e.g., R. Coase, BRITISH BROADCASTING, A STUDY IN MONOPOLY* (1950). Of course, it did neither.

As Justice Frankfurter wrote:

The very fact that Congress has seen fit to enter into the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications

FCC v. RCA Communications, Inc., 346 U.S. 86, 93 (1953) [*RCA*].

See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) [*Red Lion*].

the public, *see, e.g., Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 117 (1973) [*CBS v. DNC*], and competition⁴ among those desiring to be licensees as to which of them would best serve the "public interest, convenience and necessity." 47 U.S.C. § 307(a), (d); 309(a); 310(d) [the "public interest" standard].

In accordance with this statutory scheme in all licensing situations, the Commission is thus required to make a determination that the public interest will be served before it may grant the application -- whether for an initial license,⁵ a renewal,⁶ or a transfer⁷ -- before it. Where there are competing or "mutually exclusive" applicants, the Commission must, as a statutory

⁴It is important at the outset to note that the congressional scheme contemplates and is structured upon continuous competition between licensees and potential licensees for the right to operate on a particular frequency. Such competition is thought to serve the public interest in the best practicable service on a given frequency at any given time, and underlies, for example, the statutory requirement of hearings on mutually exclusive applications, the ability for competing applicants to file against licensees at renewal time, etc. "Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public." *Sanders Bros., supra*, 309 U.S. at 475.

The competition for licenses contemplated by the Act is quite different from that among licensees of different frequencies who compete with each other for advertisers or audiences. This latter case, audience competition, is not generally dealt with by the Act; however, where such audience competition will have a negative impact on the public interest, the Commission will take it into account in discharging its regulatory duties. *See, e.g., Sanders Bros., Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

⁵47 U.S.C. § 309(a).

⁶All licenses must be reviewed every three years, 47 U.S.C. § 307(d). The Act specifically and unequivocally provides that no licensee has any rights in the license beyond the three-year period, 47 U.S.C. § 301.

⁷Transfer applications and assignment applications, both of which are subject to the same standards as initial applications, 47 U.S.C. § 310(d), will for convenience be interchangeably referred to herein as "transfers."

matter, hold a hearing. *Ashbacker*. The Act also requires that a hearing be held

[i]f a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with the public interest, convenience and necessity.

47 U.S.C. § 309(d)(2).

In making the requisite "public interest" finding, the Commission is guided by the language of the statute⁶ and by forty years of case law which is essentially undisputed here.

B. The Public Interest Standard

The Commission's most consistent, and consistently expressed concerns have been the "maximization of outlets for local expression" and diversification of programming." *FCC v. Midwest Video Corp.*, 440 U.S. 689, 699 (1979) [*Midwest Video II*]. While the former relates more generally to the Commission's allocations policy, the latter goes to the heart of the public interest determinations which the Commission must -- and generally does¹⁰ -- make in the licensing process.

Programming is, after all, what the present or potential licensee has to offer, and it is on its ability

⁶The Act requires the Commission to "encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g). Interpreting the Act, Mr. Justice Frankfurter wrote that its "avowed aim" was "to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943) [*NBC v. U.S.*].

⁷I.e., establishing stations in as many localities as possible, and requiring broadcasters to provide local news and public affairs programming.

⁸The exception has been, and continues to be, the format cases.

to program¹¹ and its program proposals,¹² or past history¹³ and other factors which relate more or less directly to its programming¹⁴ that it is judged by the Commission.¹⁵ For example, in the year 1979 alone, the Commission, in dealing with renewal applications, has considered claims that a licensee does

¹¹For example, an applicant must meet certain financial requirements before he can be granted a license.

¹²An initial applicant is asked to describe its program proposals and to demonstrate how those proposals would contribute to diversity in its service area. See FCC Form 301, Part III, Questions 17-18. We suspect that the deletion, shortly before the issuance of the *Policy Statement*, of the latter question from the renewal application form, *Revision of Form 303*, 59 F.C.C.2d 750 (1976), was directly influenced by the Commission's position in this proceeding.

¹³The Commission and the courts have repeatedly said that a renewal applicant must "literally 'run on his record'." *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1007 (D.C. Cir. 1966) (Burger, J.), while there are a number of views as to exactly what weight that record - its excellence, substantiality, or mediocrity - may have in a comparative determination, *compare, e.g., Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1971), *cert. denied*, 403 U.S. 923 (1971), with *Central Florida Enterprises, Inc.*, 598 F.2d 37 (D.C. Cir. 1978), *cert. dismissed*, ___ U.S. ___, 99 S.Ct. 2189 (1979).

¹⁴There is no question that the licensee's programming is at issue; several subsidiary policies further demonstrate this. For example, meritorious programming will be deemed to mitigate other issues raised against a licensee, see *Chronicle Broadcasting*, 18 F.C.C.2d 120 (1969), but, unlike other areas where post-renewal upgrading may be considered, program upgrading will not, see *Rust Communications Group*, 73 F.C.C.2d 39 (1979).

¹⁵For example, the Commission has viewed both minority ownership and minority employment as factors influencing a licensee's programming decisions - hopefully toward producing more minority programming. See, e.g., *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529 (2d Cir. 1977).

¹⁶This determination of the licensee's ability to serve the public interest by his programming is a long-standing and consistent policy, see, e.g., FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946) [BLUE BOOK]; *Program Policy Statement (En Banc Programming Inquiry)*, 44 F.C.C. 2303 (1960).

not provide adequate children's programming,¹⁶ or programming to women and children,¹⁷ or to a substantial Spanish-American community,¹⁸ or that licensee has ignored issues significant to the Black community,¹⁹ or has not provided programming of specific interest to residents of New Jersey.²⁰ In each instance, the Commission has reviewed lists, descriptions, and in some instances transcripts of programs submitted by the licensee to determine whether or not its programming has met the public interest standard.

¹⁶ *Channel 20, Inc.*, 70 F.C.C.2d 1770 (1979).

¹⁷ *Community Television of Southern California*, 72 F.C.C.2d 349 (1979).

¹⁸ *Central California Communications Corp.*, 70 F.C.C.2d 1947 (1979).

¹⁹ *Mississippi Authority for Educational TV*, 71 F.C.C.2d 1296 (1979); *ABC*, 45 RAD REG. 2d (P&F) 1671 (1979). In *Alabama Educational Television Commission*, 33 F.C.C.2d 495 (1971), *renewal denied*, 50 F.C.C.2d 461 (1975) the Commission recently denied a renewal on such grounds.

²⁰ *Educational Broadcasting Corp.*, 70 F.C.C.2d 2204 (1979).

In this determination, comparative²¹ or otherwise,²² the Commission has always considered the relationship of programming to overall diversity. The comparative "merit" awarded for a proposal of specialized or unique service is the most dramatic example of the Commission's long-standing inclusion of diversity of programming -- and the corresponding importance of unique formats -- in licensing decisions.

Three years after the *Policy Statement* in this case, the Commission held that applications for licenses should be designated for hearing under the standard comparative issue where the applicant made a showing "that a proposed specialized format is not available in the particular market in a substantial amount." *George E. Cameron Jr. Communications*, 71 F.C.C.2d 460, 465 (1979).

²¹ Specialized formats, unique or otherwise, were always considered meritorious, and under the practice followed since the 1965 *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 397 n. 9 (1965) proposal of such service in a comparative proceeding would automatically have prompted an inquiry under the standard comparative issue. See *Ward L. Jones*, F.C.C. 67-82, 32 Fed Reg. 1062 (Jan. 28, 1967); *Salter Broadcasting Co.*, 8 F.C.C.2d 1036 (Rev. Bd. 1967).

The policy was somewhat limited in *Flint Family Radio*, 60 F.C.C.2d 38 (Rev. Bd. 1977) where two out of three applicants proposed "specialized formats" but no preference was given because both types of programming were already present in the community in reasonable amounts -- i.e., the proposed formats were not unique.

²² The importance of programming diversity has also made this issue part of the public interest determination in allocations proceedings. For example, the Commission has granted a waiver of its nighttime allocation rule to an applicant which proposes the first nighttime Spanish language service to its listening area, e.g., *International Radio, Inc.*, 45 RAD REG. 2d (P&F) 173 (1979); *D&E Broadcasting Company, Inc.*, 70 F.C.C.2d 646 (1978); and has granted a waiver to a subscription television applicant who promised to increase diversity by offering substantial amounts of New Jersey-oriented and locally produced programming. *Rennaissance Broadcasting Corp.*, 75 F.C.C.2d 441 (1980).

In other words, even as of this date, the Commission *requires* a hearing in a comparative situation where a license applicant proposes to *increase* diversity by offering a unique format.

**C. Standing to Raise Public Interest Issues --
The United Church of Christ Case**

Prior to 1966, the relationship of specialized or unique formats to that diversity required under the public interest standard could arise only in comparative proceedings between broadcasters, such as in the *Cameron* case, *supra*, because only those persons alleging electrical interference or direct economic injury had standing to participate in Commission licensing decisions.

In 1966, however, the manner and context in which public interest diversity issues might be raised was substantially broadened by Judge, now Chief Justice Burger's seminal and eponymous decision in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) [*UCC I*].

The court there held that responsible representatives of the listening public should be given standing, since, under the Communications Act,

standing is accorded to persons not for the protection of their private interest, but only to vindicate the public interest.

Id. at 1001.

Because listeners are those "most directly concerned with and intimately affected by the performance of a licensee," *id.*, the court saw no reason to exclude them from license proceedings, writing:

[t]his much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist.

Id. at 1002.²³

The court specifically found that deference to, or reliance on the Commission was neither an adequate nor an appropriate way of insuring that the public interest standard was met. *Id.* at 1003. Reliance on the Commission, to the exclusion of the public, was inadequate because the vast duties and jurisdiction of the Commission made it impossible to "monitor or oversee the performance of every one of thousands of licensees." *Id.* Reliance on the Commission was inappropriate, because it might require "some form of governmental supervision or 'censorship' mechanisms."²⁴ *Id.*

On the other hand, allowing public reaction through participation in licensing decisions

rather than depending on governmental initiative is also desirable in that it tends to cast governmental power, at least in the first instance, in the more detached role of arbiter rather than accuser.

*Id.*²⁵

²³ The necessity to confer standing on listeners found in *UCC I* is, of course, inconsistent with the Commission's position in the *Policy Statement* that listeners adequately cast their vote in the marketplace by the choice of whether or not to listen.

²⁴ "Nor does the fact that the Commission itself is directed by Congress to protect the public interest constitute adequate reason to preclude the listening public from assisting in that task. Cf. *UAW v. Scofield*, 382 U.S. 205, 86 S.Ct. 335, 15 L.Ed.2d 304 (1965)." *Id.*

²⁵ In other words, that very participation in raising unique format issues which the Commission argues *violates* the First Amendment by allegedly chilling licensee's programming choices was seen by the *UCC I* court as the least restrictive means of insuring that the public interest standard of the Act was carried out. See discussion at p. 82 *infra*.

The court made clear that this standing included, and indeed required listeners to raise programming issues since

unless the listeners -- the broadcast consumers -- can be heard, there may be no one to bring programming deficiencies . . . to the attention of the Commission in an effective manner.

Id. at 1004-1005.

The result of the *UCC I* decision was that, for the first time, there were parties who were able to raise questions relating to the public interest effect of the loss of diversity from the threatened loss of a unique format, rather than the gain from the addition of such a format. The public interest in diversity is precisely the same; it is only the context in which it arises -- *i.e.*, renewals or transfers, rather than initial grants or comparative renewals -- and the parties who may raise it which have changed.²⁶

D. The Format Cases

Not surprisingly, shortly after the decision in *UCC I*, the Commission was confronted by the first of a series of cases brought by listener groups who complained that the abandonment of a unique format by a prospective transferee would have a serious negative impact on the public interest in diversity.

In August of 1969, the Commission granted, without a hearing, a contested application for transfer of an Atlanta radio station, WGKA, refusing to weigh the

²⁶This is the basis for the D.C. Circuit's statement in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*) [WEFM] that

[W]e think it axiomatic that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest.

Id. at 268 (footnote omitted).

effect on the public interest of the transferee's proposed format change from classical music to a "blend" of lighter music. A survey demonstrated that some 16% of Atlanta listeners preferred classical music, which was available only on WGKA, while the proposed format duplicated one which was already broadcast on a number of stations.

The Court of Appeals reversed, *Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM & FM) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) [*Atlanta*], stating that "the substantial issue presented is that of the necessity for a hearing." *Id.* at 268.

Looking to specific statutory language, the court wrote:

The Federal Communications Act provides that no license may be transferred "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(b)

* * *

Section 309(e) of the Act provides that if, in the case of any such application, "a substantial and material question of fact is presented," or the Commission is for any reason unable to make the prescribed finding, "it shall formally designate the application for hearing * * *."

Id.

Because the court found a number of disputed factual issues,²⁷ including the impact on diversity, and thus the public interest, of the proposed format

²⁷One of these was the financial viability of the classical music format sought to be abandoned. No one has ever suggested that a licensee is required to retain, or a transferee to program a format which cannot generate some profit.

change,²⁸ it reversed the Commission and remanded for a § 309(e) hearing on those issues.

In 1971 the Commission amended its *Ascertainment Primer*, presumably to conform with the *Atlanta* decision.²⁹ However, during the four years after *Atlanta*, the Commission granted four more transfer applications without designating hearings, despite the fact that citizens groups had raised the issue of loss of a unique format in petitions to deny,³⁰ and these cases were appealed to the Court of Appeals.

²⁸The court noted the Commission's argument, repeated here, that it could not be a "national arbiter of taste" but also noted its concession that:

This is not to say that a transferee may make wholly indiscriminate program changes.

Id. at 272 n. 7.

The court gave short shrift to the Commission's exaggerated reservations, stating:

The question is, as here, what are the community needs and will they be properly served by the proposed transfer? The Commission is not dictating tastes when it seeks to discover what they presently are, and then to consider what assignment of channels is feasible and fair in terms of their gratification.

Id.

Applicants who intended to "substantially change" a program format were told to

be prepared to support their proposals to change formats in light of the needs and tastes of the community and the types of programming available from other sources.

Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C. 2d 650, 680 (1971).

These were *Citizens Committee to Preserve the Present Programming of WONO-FM v. FCC*, No. 71-1336 (D.C. Cir., May 13, 1971) (summary reversal on application for stay); *Twin States Broadcasting Inc.*, 35 F.C.C. 2d 969 (1972), *rev'd sub nom. Citizens Committee to Keep Progressive Rock (WGLEN-FM) v. FCC*, 478 F.2d 926 (D.C. Cir. 1973) [*Progressive Rock*]; *Charles A. Haskell*, 36 F.C.C. 2d 78 (1972), *aff'd sub nom. Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973) [*Lakewood*], and *RKO General, Inc.*, 23 RADREG. 2d (P&F) 930, *aff'd sub nom. Hartford Communications Committee v. FCC*, 467 F.2d 408 (D.C. Cir. 1972) [*Hartford*].

In two of them, the court agreed that no material issues of fact were raised;³¹ one involved only a stay application.³² The fourth was *Progressive Rock*, where material issues were raised as to the uniqueness and financial viability of a format sought to be abandoned. The D.C. Circuit, on appeal, again explained to the Commission that format changes affecting diversity must be treated no differently than any other element affecting the public interest — i.e., if there are factual disputes a hearing must be held; if there are no factual disputes, it need not.³³

The WEFM Decision

In 1973, confronted with the petition to deny a transfer application which allegedly would have eliminated a unique classical music format in Chicago, the Commission again refused to hold a hearing. Denying a petition for reconsideration, a majority of Commissioners also issued a separate "policy statement" in which they stated their belief that the efficacy of market forces in the area of entertainment formats made it both unwise and essentially unnecessary for the Commission to consider a format issue where it was raised in a petition to deny. *Zenith Radio Corp.*, 40 F.C.C. 2d 223, 230 (1973).³⁴

Lakewood and Hartford

Citizens Committee to Preserve the Present Programming of WONO-FM v. FCC, *supra*.

The court noted what was becoming a seemingly intransigent position by the Commission regarding the refusal to consider this diversity issue as raised by listeners in licensing proceedings, and wrote:

It is our distinct impression . . . that the Commission desires as limiting an interpretation [of *Atlanta*] as possible. We suspect, not altogether facetiously, that the Commission would be more than willing to limit the precedential effect of [*Atlanta*] to cases involving Atlanta classical music stations.

Progressive Rock, *supra*, 478 F.2d at 930.

³³This was the *Additional Views of Chairman Burch In Which Commissioners Robert E. Lee, H. Rex Lee, Reid, Wiley and Hooks join [the Burch Statement]*.

However, the *Burch Statement* at least apparently qualified any notion that market forces were dispositive, stating:

This is not to say, however, that licensees or applicants have unbridled discretion in selecting their entertainment formats. The Commission will take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming . . . *If and when there is a showing of facts before the Commission indicating that . . . the format change will eliminate a service to the public not otherwise available . . . a hearing may be required.*

Id. at 231 (emphasis added).

The D.C. Circuit heard the appeal *en banc*. *WEFM*. The court expressed its disagreement with the *Burch Statement's* assumptions that marketplace economics will inevitably promote diversity and serve the public interest,¹⁶ but its review and restatement of prior

The court wrote there is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time.

Id. at 268.

It went on to speak of the problem of audience demographics which often drastically limits the number and kind of potential listeners a broadcaster - mindful of his advertisers - will wish to reach. The statements made by the court are entirely unexceptional and are supported by commentators, see, Center for Public Resources, RADIO REPORT: AN INQUIRY INTO THE POTENTIAL FOR EXPANDING DIVERSITY IN COMMERCIAL PROGRAMMING (Markle Foundation 1979) (the "marketplace" for which advertisers aim is only 60% of the population of potential listeners; dependence on ratings is a disincentive to diversity, *id.* at 7, 22). See generally E. Barnouw, THE SPONSOR: NOTES ON A MODERN POTENTATE (1978), and examples well known to the Commission. See, e.g., Brown, *Some Flavor to New Prime Time Shows*, New York Times, Jan. 1, 1976 (Lawrence Welk Show, one of the most popular on television, cancelled because a large portion of its audience was older Americans with low discretionary incomes).

holdings was ultimately premised not on conflicting policy judgments, but rather squarely in a statutory analysis of §§ 309(a), (d)(1) and (d)(2) of the Communications Act,¹⁶ 47 U.S.C. §§ 309(a), (d)(1) & (d)(2). See *WEFM*, *supra*, at 506 F.2d at 258-59.

The court wrote, once again:

When faced with a proposed license assignment encompassing a format change, the FCC is obliged to determine whether the format to be lost is unique or otherwise serves a specialized audience that would feel its loss. If the endangered format is of this variety, then the FCC must affirmatively consider whether the public interest would be served by approving the proposed assignment, which may, if there are substantial questions of fact or inadequate data in the application or other officially noticeable materials, necessitate conducting a public hearing in order to resolve the factual issues or assist the Commission in discerning the public interest.

WEFM, *supra*, 506 F.2d at 262.

The Format Inquiry

The Commission chose not to seek this Court's review of the *WEFM* decision, but rather determined to institute an "Inquiry," *In the Matter of Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, Notice of Inquiry*, 57 F.C.C.2d 580 (1976), FCC App. 60a-116a [*Notice of Inquiry*],

"In other words, the *WEFM* decision was an explication of statutorily mandated procedure under § 309(e), much like this Court's decision in *Ashbacker*, rather than a choice of, or substitution of its own views on policy, as this Court found occurred in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [NCCB].

into whether or not it should follow that decision.¹⁷ 57 F.C.C.2d at 582, FCC App. 66a.

In engaging in this entirely unorthodox enterprise, however, the Commission demonstrated that its past resistance and "enduring concern" were based on a total misreading of what the Court of Appeals had done. It paraphrased the *WEFM* decision as presenting the question

Whether the public interest standard of the Communications Act of 1934, as amended, requires close scrutiny of broadcast entertainment formats to assure an appropriate diversity?

Notice of Inquiry, 57 F.C.C.2d at 582, FCC App. 65a (emphasis added).

Further, the *Notice* described the results of the *WEFM* decision as

rejecting the programming choices of individual broadcasters in favor of a system of pervasive government regulation.

57 F.C.C.2d at 583, FCC App. 65a.

Commissioner Hooks concurred in the *Notice of Inquiry* insofar as it heralded an attempt to devise regulations for effectuating the *WEFM* decision. Significantly, he wrote:

I was one of those who joined former Chairman Dean Burch's statement in *WEFM* wherein we expressed a natural dread of becoming too deeply enmeshed in format choices. But, after reading again the decisions in the so-called "format cases", and, however loathe we personally may be to lay hands on the format porcupine, the final responsibility of assuring service to all segments of the community may ineluctably abide here.

57 F.C.C.2d at 588, FCC App. 78a-79a (footnotes omitted).

This, of course, was nothing like what the Court of Appeals had decided,¹⁸ but the Commission proceeded to answer its own question in a proceeding which was as fraught with error as its phrasing of the question had been.

The *Inquiry*, from its inception to its conclusion, cannot be even charitably characterized as anything other than a sham. The *Notice's* statement that "the course charted by the Court may lead only to expense, delay and stagnation," 57 F.C.C.2d at 584, FCC App. 69a, made abundantly clear that the Commission had entirely prejudged the issue. The record of the *Inquiry* itself was filled with procedural irregularities, violations of the Administrative Procedure Act [A.P.A.],¹⁹ and a generally impermissible attitude of "hostility and impatience"²⁰ toward the public interest groups who participated.

Clearly the court's decision did not require "close scrutiny of broadcast entertainment formats" in general, since it was based entirely upon the statutory requirement of a hearing only in very carefully delineated circumstances. Further, the Court of Appeals never even suggested that the Commission should generally assure diversity, but rather held only that, in the same carefully delineated circumstances, it should look at whether the loss of a particular format in a particular assignment situation would substantially decrease diversity.

Foremost among these was reliance on staff studies whose existence the Commission had not disclosed, although requested under the FOIA, prior to issuing its decision, thus precluding any public comment. To compound the error, although the "results" of the studies were appended to the *Policy Statement*, the underlying data and methodology employed to reach conclusions was not. Despite additional motions and FOIA requests, the material necessary to evaluate and rebut the staff studies was not finally fully disclosed until long after the period to petition for reconsideration had passed. The chronology of the Commission's "secret studies" error is discussed *infra* at pp. 45-49; significantly, at least one judge believed that the decision should be reversed solely on that ground. *WNCN*, 610 F.2d at 858, FCC App. 41a (concurring opinion of Bazelon, J.).

¹⁹ *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543, 548-50 (D.C. Cir. 1969) [*UCC II*].

The Policy Statement

Given the *Notice of Inquiry* and the proceeding of the *Inquiry*, the *Memorandum Opinion and Order*, 60 F.C.C.2d 858 (1976), FCC App. 117a-175a [the *Policy Statement*] was not surprising, except in one respect. Although the Commission reiterated its faith in marketplace economics to maximize diversity, 60 F.C.C.2d at 863, 864, FCC App. 128a, 130a, significantly, it admitted that there clearly were instances where market forces failed. *Id.*

It was with regard to this latter situation that the Commission finally departed entirely from the language -- if not the result -- of the *Burch Statement*. It wrote:

The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 F.C.C.2d at 231. Having given the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor necessary in the public interest. Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats, and that Commission supervision in this area will not be conducive either to producing program diversity nor satisfied radio listeners.

60 F.C.C.2d at 866 n. 8, FCC App. 134a n. 8.

Thus, even though the Commission once again restated its long-held policy that diversity in programming is part of the public interest standard applicable in § 309 determinations, 60 F.C.C.2d at

863, FCC App. 128a,⁴¹ it flatly refused ever to even look at the effect the loss of a unique format might have on diversity in instances of clear marketplace failure.

Commissioner Hooks dissented, stating:

without suggesting an alternative response to minority format abandonment, the majority does not provide a mechanism to ensure service to significant minority tastes and needs if market forces do not. *In this Republic, the role of regulation of commerce has been to offset and remedy errant or inefficient market forces.* The Commission's role in the commercial regulatory structure is well defined.

I do not intend to imply a desire for the end of "format radio" or wish to impose a comprehensive duty on every station to proportionately serve every entertainment preference. Neither do I wish to impede program experimentation and creativity. But, equally, I stand by the *Separate Statement* of former Chairman Dean Burch in the *WEFM* case, which I joined, *recognizing that extreme cases should compel our official attention.*

60 F.C.C.2d at 882, FCC App. 171a-172a (emphasis added).

⁴¹ The Commission's restatement is entirely in accordance with the Court of Appeals' prior exegesis of the public interest in diversity of programming, and with its reiteration of that issue below. The difference is not in interpretation of the statutory public interest standard, but only as to whether the procedures prescribed by the statute to effectuate the standard may be ignored.

The Court of Appeals Decision

The Court of Appeals, again sitting *en banc*, reviewed the *Policy Statement* under the traditional standards of the A.P.A.

The court emphasized that because its prior decisions were based "solely in the context of the current regulatory scheme laid down by Congress," *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 857 (D.C. Cir. 1979) (*en banc*), FCC App. 2a, 38a [*WNCN*], the Commission was bound by its interpretation of the statute. It compared the *Policy Statement's* response to that binding procedural interpretation as not unlike the Commission's earlier response to the decisions in *UCC I* and *UCC II*.¹²

The court also found the *Policy Statement* totally lacking in impartiality and rationality. *WNCN, supra*, 610 F.2d at 846, FCC App. 14a. The former derived from numerous procedural violations¹³ including the previously discussed "secret studies,"¹⁴ the latter from the Commission's total misreading and "Manichaeian" analysis of the format cases, 610 F.2d at 849-51, FCC App. 21a-26a, and its articulated justifications for abandoning its clear statutory duty.

¹²The court wrote:

In *United Church of Christ*, as here, the Commission asserted all manner of difficulties with the Court's interpretation of the statute - including notably severe administrative burdens hampering the discharge of its regulatory responsibilities . . . The Commission, despite its parade of horrors in [*UCC*], has obviously survived.

610 F.2d at 857, FCC App. 38a.

¹³The court also noted, *inter alia*, the Commission's total failure to consider many of the comments filed by public interest groups, particularly as those comments had, in good faith, responded to the Commission's rhetorical inquiries about how to implement the format decisions - if, of course, it chose to do so. 610 F.2d at 850, FCC App. 22a-23a. Such failure is also arguably a fatal violation of § 553 of the A.P.A. See discussion at pp. 40-41 *infra*.

¹⁴See note 39 *supra*, and discussion at pp. 45-53 *infra*.

The court analyzed and disposed of those four justifications as follows:

1) First, as to the Commission's claim that the record showed "how effective the tool of competition has been in carrying out Congress' plan for entertainment programming," *Policy Statement*, 60 F.C.C.2d at 861, FCC App. 124a, the court found that insofar as the record relied on primarily consisted of the unreleased, untested secret staff studies, that record was legally inadequate, *WNCN, supra*, 610 F.2d at 846, FCC App. 15a. Also, as a legal matter, the finding that the variation of audience shares within a given format is nearly as great as the variation among formats is ultimately entirely irrelevant to the question of whether the Act requires the Commission to look at the loss of diversity in the threatened abandonment of a particular unique format (*i.e.*, when market forces fail to preserve or maximize diversity) in the context of a required public interest¹⁵ finding.

2) The "administrative nightmare" stressed by the Commission in its *Policy Statement* and briefs to the Court of Appeals was conceded by counsel at oral argument to be an "exaggeration" and not "very significant at all," *WNCN, supra*, 610 F.2d at 849, FCC App. 20a, a voluntary but necessary characterization which the Court of Appeals determined was amply supported by an examination of the actual burdens imposed on the Commission by the format cases since *Atlanta*.¹⁶ *WNCN, supra*, 610 F.2d at 848, FCC App. 18a.

¹⁵Here the Commission's repeated apparent confusion of "consumer satisfaction" with the "public interest, convenience and necessity" may have played a large part in its misunderstanding of the statutory issue.

¹⁶*WNCN, supra*, 610 F.2d at 848-849, FCC App. 18a-20a. See discussion at pp. 35-38 *infra*.

The court also noted that the extent to which the Commission's *Policy Statement* laid so much stress⁴⁷ on an argument which was so lacking in actual merit was another factor "casting considerable suspicion on the rationality of that decision." 610 F.2d at 849, FCC App. 20a.

3) The Court of Appeals found that the Commission's argument that *WEFM* required it to impose an improper, common-carrier-like obligation on broadcasters was, based on this Court's decisions, legally incorrect. Both *CBS v. DNC* and *Midwest Video II* discussed "common-carrier-like obligations" as involving the requirement of some form of private access -- not the requirement which has been upheld since the beginning of the Act that licensees are, as a condition of their licenses, required to provide programming which serves the public interest, *see e.g., Red Lion*.

4) The Court of Appeals found that the Commission's First Amendment fears were also premised on its "drastic misreading of the format cases," 610 F.2d at 850, FCC App. 23a.⁴⁸ Rather than requiring pervasive, comprehensive governmental inquiry in choosing all formats, those decisions required no more review of programming in limited individual circumstances than has been repeatedly recognized

⁴⁷ The court aptly characterized the language of the briefs and decisions on this issue as "almost frenzied rhetorical excess." 610 F.2d at 849, FCC App. 20a.

⁴⁸ As the Court of Appeals wrote, the Commission analyzed the problem in stark terms: formats are to be chosen either by market forces or by "the alternative to the imperfect system of free competition . . . a system of broadcast programming by government decree." *Denial of Reconsideration*, *supra*, 66 F.C.C.2d at 81. *WEFM*, in the Commission's view, is the antithesis of the free market: it mandates a "system of pervasive governmental regulation," *Notice of Inquiry*, *supra*, 57 F.C.C.2d at 582, requiring "comprehensive, discriminating, and continuing state surveillance." *Policy Statement*, *supra*, 60 F.C.C.2d at 865, citing *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

610 F.2d at 850, FCC App. 23a.

as consistent with, and indeed required by, the Communications Act.⁴⁹

The Court of Appeals reviewed the record for evidence of the Commission's oft-stated contention that the format decisions would deter experimentation and innovation and found none. The Commission's own study, to the contrary, "concluded that under the *WEFM* regime licensees have been aggressive in developing diverse entertainment formats." 610 F.2d at 851, FCC App. 25a.

Finally, the court emphasized the narrowness of the Commission's powers under *WEFM*, a limitation which falls well within the First Amendment broadcast decisions of this Court. It reiterated that the Commission

merely has the power to take a station's format into consideration in deciding *whether to grant certain applications*. It has no authority under *WEFM* to interfere with licensee programming choices: it cannot restrain the broadcasting of any program, dictate adoption of a new format, force retention of an existing format, or command provision of access to non-licensees. To say that it is empowered to impose censorship or common carrier obligations is to stretch *WEFM* virtually beyond recognition.

WNCN, supra, 610 F.2d at 851-52, FCC App. 25a-26a.

⁴⁹ *Red Lion, supra*. See discussion at pp. 73-76 *infra*.

SUMMARY OF ARGUMENT

As the Statement of the Case demonstrates, the Commission's *Policy Statement* and its ten-year format policy represent an aberration from its otherwise clearly understood statutory obligations. For although the Commission admits that diversity of programming is a critical component of the Act's public interest standard, although it routinely applies that public interest criterion in other proceedings where only licensees and potential licensees are parties, and although it recognizes that the marketplace does not work perfectly in producing or protecting diversity, the Commission has unequivocally refused to even look at the impact on the public interest in diversity in renewal or transfer situations where the abandonment of a unique, financially viable entertainment format is proposed, choosing instead to abdicate this statutory obligation to "marketplace forces."

Whether the Commission's refusal to perform its statutorily mandated obligation is based on honest misunderstanding, or to an ultimate antipathy to Chief Justice Burger's *UCC* opinions, the Court of Appeals was clearly correct in setting aside the *Policy Statement* on a number of relatively narrow, and legally unexceptionable grounds.

In applying the standards of judicial review required by the Administrative Procedure Act, the court properly interpreted both the statute and the Constitution, and found the *Policy Statement* invalid as "short of statutory right," 5 U.S.C. § 706(C), "arbitrary, capricious . . . or otherwise not in accordance with law," 5 U.S.C. § 706(B), and suggested, although it did not reach the issue, that the *Policy Statement* had also been enacted "without observance of procedure required by law," 5 U.S.C. § 706(D) (Point I, *infra*).

The Court of Appeals premised its § 706(C) determination on the Commission's clear abdication of statutory obligation to make a public interest determination concerning the impact on diversity of the

loss of a unique format under specific, limited circumstances, in individual renewal and transfer proceedings (Point I [A], *infra*).

The court found the *Policy Statement* arbitrary and capricious because of its reliance on contentions which were entirely unsupported, and which the Commission later abandoned, its misreading and exaggeration of the format decisions to which it purported to respond, its failure to seek ways to implement the prior, legally binding format decisions of the court, and its reliance on staff studies which had never been made available for public comment (Point I [B], *infra*).

At least one Circuit Judge would have set the *Policy Statement* aside solely on the ground that undisclosed and unrebutted reliance on the staff studies violated § 553 of the A.P.A. and due process of law. Respondents urge this as an alternative ground for affirmance (Point I [C], *infra*).

The Court of Appeals determination that the Commission must make the requisite public interest determination in unique format cases was not based on the court's policy views (which did not, in any event, substantially differ from those of the Commission), but on an analysis entirely grounded in the Act (Point II [A], *infra*).

The decision of the Court of Appeals was entirely in accord with, and indeed compelled by the Commission's own, otherwise consistent interpretations of the Act, and those of this Court and the legislative history (Point II [B], *infra*).

The Court of Appeals decision was also entirely consistent with, and again compelled by the paramount First Amendment rights of listeners, as defined in this Court's *Red Lion* decision (Point III [B], *infra*). The Petitioners' attempt to impose a non-broadcast oriented "least drastic means" test is inappropriate

and impermissible, since it would effectively require overruling *Red Lion*, whose continued vitality is not, and ought not to be in doubt (Point III [A], *infra*).

The Petitioners' contentions that the format decisions chill licensee program discretion ignore this Court's prior decisions, and the public trusteeship concept of the Act (Point III [C], *infra*). Similarly, the Court's decision does not violate § 326 of the Act (Point III [D], *infra*), nor is it, by any test, void for vagueness (Point III [E], *infra*).

Finally, the importance of the format cases on both First Amendment and statutory public interest grounds is most clearly exemplified in the area of unique foreign language formats whose unexamined abandonment would be not only statutorily impermissible, but profoundly antidemocratic (Point III [E], *infra*).

POINT I

The Court of Appeals Applied the Appropriate Standard of Judicial Review, and Properly Found the Commission's Policy Statement Unlawful

Under the Administrative Procedure Act, a court reviewing an agency decision is specifically empowered, and indeed required to "decide all relevant questions of law, [and] interpret constitutional and statutory provisions . . ." 5 U.S.C. § 706.

In addition, it is required to

hold unlawful and set aside agency actions which are

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

• • •

(C) in excess of statutory jurisdiction, authority or limitations or short of statutory right;

(D) without observance of procedure required by law.

Id. This Court's decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 (1971), makes clear that these three provisions are separate standards, and that informal agency rulemaking must comply with all of them. Here it complied with none.

The court below specifically and correctly invalidated the Commission's decision under two of these grounds, (A) and (C) above, and indicated that it was not necessary to rely on (D) only because the other grounds were so compelling.⁵⁰ Far from usurping the Commission's authority or policy-making power, the court acted in a matter entirely consistent with, and indeed compelled by the A.P.A.

A. The Commission's Decision Was "in excess of statutory jurisdiction [or] -- short of statutory right"

As already briefly discussed, the relevant sections of the Communications Act require the Commission to make a public interest determination in a number of situations, and to hold a hearing where there are disputed facts upon which such determination must be made. This is, in fact, precisely what the D.C. Circuit held in *WEFM* and again below.

The decision below is, in fact, nothing more than a straightforward implementation of the regulatory scheme which Congress adopted in the Radio Act of 1927 and later the Communications Act of 1934, and which this Court has articulated in over forty

⁵⁰ Judge Bazelon would have reversed on the procedural ground alone. 610 F.2d at 858. FCC App. 41a (concerning opinion). See also note 92 *infra*.

years of decisions. The holdings of those decisions have clearly and consistently reiterated that Congress rejected reliance on competition alone as the basis for allocation and exploitation of the electromagnetic spectrum.⁵¹

Instead, as this Court has also repeatedly held, Congress enacted a comprehensive regulatory scheme based upon licensing the use of radio frequencies. The licensing scheme imposed an obligation on the Commission to make choices among prospective licensees,⁵² and to regulate those licensees consistent

⁵¹ *E.g.*, *RCA*, *supra*, 346 U.S. at 93-94, 97. See discussion at pp. 4-5 *supra*.

⁵² See, *e.g.*, Mr. Justice Frankfurter's oft-quoted metaphor:

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity."

NBC v. U.S., *supra*, 319 U.S. at 215-216.

with the "public interest, convenience and necessity."⁵³

In sum, the Act prohibits the Commission from totally relegating the public interest determination to the marketplace, and specifically imposes upon it the duty of making a public interest determination, including holding a hearing, where necessary, when it considers each individual license application. As this Court has written,

In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience or necessity."

NBC v. U.S., *supra*, 319 U.S. at 225.⁵⁴

⁵³ As early as 1928 the Federal Radio Commission, the predecessor of the present Commission, wrote:

Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission must determine from among the applicants before it which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser.

Federal Radio Commission, *Second Annual Report* 269-70 (1928), quoted with approval in *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 139 n. 2 (1940) ["Pottsville"].

⁵⁴ This has, until the format cases, been the Commission's consistent position, demonstrating its clear understanding of its statutory obligation. The Commission's brief in the early *Pottsville* case is illustrative. The Commission wrote:

The one constant factor in all [licensing] cases is the requirement that the Commission must act upon every application filed, and must in its action on the application grant or deny as required by the statutory criteria.

Brief for Petitioner at 16, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The Commission's refusal to abide by the procedures required by the statute -- a refusal to even "look" at the effect on diversity of the loss of a unique format -- is thus a decision both beyond its statutory power and one which is not within, or "short of" statutory right.⁵⁵

Whatever the standard of judicial review where agency action is claimed to be "arbitrary and capricious," there is no requirement of deference to agency determinations as to the law itself, e.g., *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1119 (D.C. Cir. 1969) (Burger, J.). Cf. *Midwest Video II*.⁵⁶ Quite the contrary, under both the separation of powers, and the statutory scheme of the A.P.A., reviewing courts are and must be the final arbiters of statutory construction.

Prior decisions from this and other courts which define the Commission's statutory obligations illustrate the A.P.A.'s requirement that the reviewing

⁵⁵ See the more extensive discussion of the statutory basis for the decision at Point II *infra*.

⁵⁶ It is significant that in cases like *Midwest Video II*, as well as its predecessor cable cases, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) and *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) [*Midwest I*], or other cases defining the Commission's statutory power, see e.g., *National Association of Theatre Owners v. FCC*, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970) (upholding power to authorize subscription television), there is virtually no discussion of the standard of judicial review or of deference to the agency's views. Clearly in all those and many similar cases, it is for the court, and the court alone, to decide what the statute means and what it permits.

Statutory construction, and the means by which a statute is to be implemented are, of course, entirely different matters. The various petitioners labor mightily to turn this case from the former to the latter, see e.g., FCC Br. 33-35, ABC Br. 35, 62-70, but they are ultimately unsuccessful, since the issue is not a difference in opinions between the Commission and the court as to whether unique formats are in the public interest -- (see pp. 9-10 *supra*, (both agree they are) -- but rather, the Commission's "opinion" that it shouldn't be required to follow statutory requirements in such cases because someone else -- advertisers -- will do its work for it.

court "will . . . decide and interpret statutory provisions," e.g., *Ashbacker, FCC v. National Broadcasting Co. (KOA)*, 319 U.S. 239 (1943) [*FCC v. NBC (KOA)*]; *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971) and *UCC I*,⁵⁸ which is precisely what the Court of Appeals has been doing since *Atlanta*, and through the decision below. This is no usurpation of agency function -- rather it is a restatement by the court of the agency's legal obligation to make its own independent public interest determination in each case which comes before it. See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).⁵⁹

B. The Commission's Decision Was Arbitrary and Capricious

The generally accepted standard for judicial review of agency action attacked as "arbitrary and capricious" is that such action may be upheld only if it is "reasonable." See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 800 (1968). This in turn requires some analysis of the record to determine, e.g.,

⁵⁸ Each of these cases involved interpretation of statutory provisions requiring hearings (*Ashbacker* and *Citizens Communications Center v. FCC*, *supra*) or the right to participation in a hearing with attendant standing to appeal (*FCC v. NBC (KOA)* and *UCC II*). An examination of the Commission's briefs in all those cases reveals no contention that the court's reading of the statute would not be binding on the Commission. Indeed, after each decision the Commission followed the court's statutory interpretation.

⁵⁹ In this respect, this Court's decision in *NCCB* supports, rather than undermines the decision below. In *NCCB* the Commission refused to adopt a retroactive, across-the-board rule, which the Court of Appeals would have required. Instead, the Commission, as upheld by this Court, left open the opportunity for parties to raise -- and the Commission to decide -- the public interest diversity implications of individual license renewal applications by "grandfathered" licensees. *Id.*, 436 U.S. at 810, 811.

what questions the agency asked (to determine the reasonableness of the answers), whether there is record support, etc. This Court has held that a court should not hesitate to undertake a "thorough, probing, in-depth" review of the rulemaking record to determine whether, *inter alia*, the agency failed to resolve the substantive issues before it in a rational fashion. *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 415.

The Court of Appeals, reviewing the Commission's decision and the record in the *Inquiry*, found a number of factors which "cast serious doubt on the rationality and impartiality of [the Commission's] action." *WNCN*, *supra*, 610 F.2d at 846, FCC App. 14a. The major factors⁶⁰ were:

- 1) The contention that enforcing *WEFM* would be an "administrative nightmare." *Id.*⁶¹ FCC App. 14a.⁶¹
- 2) The continued exaggeration and "drastic" misreading of *WEFM* and other format decisions which provided the springboard for the *Inquiry* and *Policy Statement*, *Id.* at 850, FCC App. 23a.⁶²

⁶⁰The court noted other failures, including the absence of any evidence that the format cases deterred licensees from experimenting with new formats. Rather, as the court pointed out, the Commission's own evidence showed that broadcasters had been aggressive in developing diverse entertainment formats. *WNCN*, *supra*, 610 F.2d at 851, FCC App. 25a.

⁶¹A sub-category of this was the Commission's repeated statements of its inability to classify formats, and especially to know a "unique" format when it saw one. See discussion at pp. 37-38 *infra*.

⁶²This is perhaps best understood by a simple analogy. If the court had ruled that the statute required red apples, and the Commission had read that decision as requiring blue apples, an inquiry into blue apples, while *internally* rational, would be inherently *irrational* since blue apples were never the issue. Further, a decision stating that the Commission couldn't or wouldn't find blue apples, even if supported by the record, bears no relationship to the statutory requirement of red apples, and so is also irrational.

3) The clear refusal to seek ways of enforcing the limited mandate of *WEFM* and other format cases, *Id.* at 852-53, FCC App. 27a-28a, and refusal or failure to look at proposals made by parties⁶³ and others.

4) Reliance on undisclosed material⁶⁴ which, in addition, did not actually support the Commission's position.

Each of these grounds, as the court's opinion carefully demonstrates, provides adequate basis for setting aside the Commission's decision under the arbitrary and capricious standard; cumulatively they compel the result ordered by the court.⁶⁵

1) The Administrative Nightmare Argument

One of the grounds relied upon by the Commission in its ultimate refusal to look at the loss of unique formats in even the most limited situations⁶⁶ was its fear of the burden upon it, and the "delay and inconvenience" to the broadcast industry which holding the hearings required by *WEFM* would cause. *Policy Statement*, 60 F.C.C.2d at 864, FCC App. 131a.

⁶³This is also a part of the "hostility" to "public intervenors" which was condemned in *UCC II*, *supra*, 425 F.2d at 548, 550, and which was a factor in finding the Commission's decision there unsupportable and unlawful under the A.P.A.

⁶⁴This ground, which the court saw as going to the irrationality of the Commission's decision, is separately discussed *infra* as a ground for reversal under § 706(D) and so will be only briefly included within this subpoint B.

⁶⁵This is not unlike the decision in *UCC II* where Mr. Chief Justice Burger found a variety of factors to have damaged the record in that proceeding "beyond repair," 425 F.2d at 550, requiring that the order be totally vacated.

⁶⁶*I.e.*, after there had been significant public grumbling, and a *prima facie* showing of both uniqueness and financial viability.

The Court of Appeals correctly found that the "administrative nightmare" posed by the Commission was "little more than a dream," *WNCN, supra*, 610 F.2d at 848, FCC App. 18a, based on its review of the history of format litigation,⁶⁷ and on the truthful, if somewhat belated concessions made by counsel for the Commission at oral argument.⁶⁸

The Commission's characterization and discussion of the hearing held in *WEFM* itself similarly shows a certain lack of candor, and undercuts any reliance placed on it by the *Policy Statement*. The Commission disingenuously characterized that hearing as "fairly typical of format abandonment hearings," *Policy Statement*, 60 F.C.C.2d at 864, FCC App. 131a; in fact, it is the only one ever held!⁶⁹ In addition, the

⁶⁷As the court pointed out, in ten years "a mere handful" of format cases had reached that court, *WNCN, supra*, 610 F.2d at 848, FCC App. 19a, and, according to the Commission, "perhaps half a dozen" petitions to deny based on format issues were pending at the time of argument, *id.* at 849, FCC App. 19a-20a. This comports precisely with respondents' understanding: sadly many unique formats disappear without the requisite public grumbling, or without organized citizens groups to protest their demise. For example, in 1977 Baltimore, Maryland lost its only classical music station, WCAO-FM. Compare BROADCASTING YEARBOOK 1977, at C-95, with the same source one year later at C-98. In 1973 Allentown, Pennsylvania lost its only source of classical music on WFMZ. Compare BROADCASTING YEARBOOK 1973, at B-166 with BROADCASTING YEARBOOK 1974, at B-175. In those and many other instances, no challenge has been filed, under *WEFM*, the Commission is thus not required to consider the issue.

⁶⁸Counsel conceded the administrative nightmare argument was an "exaggeration" and "not very significant at all," *WNCN, supra*, 610 F.2d at 849, FCC App. 20a.

⁶⁹Additionally, although the Commission does not mention it, the hearing considered a number of issues beside the uniqueness of the format and its financial viability, even assuming the Commission's time estimates were correct, much of that time was not attributable to the format issues. See *Zenith Radio Corp.*, 56 F.C.C.2d 1095 (1975).

accuracy of the time estimates even of that singular occurrence is, by the Commission's own admissions elsewhere, in doubt,⁷⁰ although the *Policy Statement* nowhere admits that such is the case. Finally, the Commission ignored the fact that every year it holds numerous hearings, all ultimately going to the question of whether the public interest is being or will be served, and that even the allegedly typical and overwhelming *WEFM* hearing was "less extensive than the typical comparative renewal proceeding."⁷¹

Although the Commission discussed the issue separately, its continued insistence that it would be impossible to determine if a format is unique because "[w]hat makes one format unique makes all formats unique," *Policy Statement*, 60 F.C.C.2d at 862, FCC App. 127a, also may be considered part of its irrational, or arbitrary and capricious reliance on the "administrative nightmare" argument. As previously discussed, the Commission makes judgments based on its evaluation of formats as "specialized" or even as "unique" in a number of other contexts including

⁷⁰The reliability of the figures set forth in the *Policy Statement* was undermined when the Commission, responding to an FOIA request for data and memoranda pertinent to this statement, replied that "there were no written or documented studies as to the amount of time devoted to the *WEFM* proceedings; rather, the information in the Memorandum Opinion and Order was based on oral estimates given during the hearing by the Administrative Law Judge and participating Broadcast Bureau counsel." *Citizens Communications Center*, 61 F.C.C.2d 1017, 1018 (1976).

WNCN, supra, 610 F.2d at 849, FCC App. 19a, citing Note, *Judicial Review of FCC Program Diversity Regulation*, 75 Colum. L. Rev. 401, 406 n. 33 (1975). See also Wall, *Section 309 of the Communications Act - The Renewal Provision - A Need for Change*, 25 Admin. L. Rev. 407, 412 (1973).

license grants,⁷² cable TV distant signal importation,⁷³ and waivers of nighttime allocation rules.⁷⁴ Thus the Commission's claimed inability to do in format loss situations what it routinely does elsewhere is yet another ground "cast[ing] serious doubt on the rationality and impartiality of its action." *WNCN*, *supra*, 610 F.2d at 846, FCC App. 14a.

2) Exaggeration and Misstatement of the D.C. Circuit's Format Decisions

As the Circuit Court noted:

Throughout the format controversy, the Commission has displayed a deep-seated aversion to the decisions of this court (and to the advocates of those decisions) while at the same time misinterpreting and exaggerating their meaning.

WNCN, *supra*, 610 F.2d at 849, FCC App. 21a. Although the Commission actually began its *Inquiry* with a correct statement of the *WEFM* holding,⁷⁵ it immediately distorted that narrow holding⁷⁶ by imputing to it a "require[ment] [of] close scrutiny of broadcast entertainment formats," *Notice of Inquiry*, 57 F.C.C.2d at 582, FCC App. 65a, which would require a "system of pervasive governmental regulation," *Id.* Rather than looking, in limited renewal or transfer situations,

⁷²See, e.g., *George E. Cameron Jr. Communications*, *supra*, indicating a change in policy which limits designation of a standard comparative issue on programming to the proposal of *unique* formats, not simply specialized issues. See also *Flint Family Radio*, *supra*.

⁷³47 C.F.R. § 76.5(kk) (1977). See *Specialty Stations*, CATV First Report and Order 58 F.C.C.2d 442, 452-53 (1976).

⁷⁴See, e.g., *International Radio, Inc.*, *supra*.

⁷⁵See *Notice of Inquiry*, 57 F.C.C.2d at 581-82, FCC App. 64a-65a, quoting *WEFM*. See also *Policy Statement*, 60 F.C.C.2d at 858, FCC App. 118a.

⁷⁶An equally pervasive error is the continual mischaracterization of the decision - continued through the briefs in this case - as one of policy, rather than of statutory construction. See e.g., *WNCN*, *supra*, 610 F.2d at 854-55, FCC App. 32a.

at whether the public interest would be served by the loss of a unique, financially viable format, the Commission saw the *WEFM* decision as somehow requiring it to distribute⁷⁷ or allocate formats within a market.⁷⁸ This total mischaracterization of the narrow and limited *WEFM* holding⁷⁹ inexplicably persists through the briefs filed in this Court, demonstrating a similar misreading of the *WNCN* decision.⁸⁰

As the D.C. Circuit held in a slightly different context:⁸¹

a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.

Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) [*HBO*], citing *City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971).

Here, of course, the Commission's decision actually violated its statutory mandate; additionally though, it responded to problems that did and do not exist, and tilted at a windmill of "pervasive regulation"

⁷⁷See, e.g., Separate Statement of Chairman Wiley in the *Notice of Inquiry*, 57 F.C.C.2d at 586, FCC App. 74a, 74a-75a.

⁷⁸The leading proponent of this view was Commissioner Robinson. See, e.g., his concurring statement, *id.* at 589, 600-01, FCC App. 82a, 198a.

⁷⁹This is particularly surprising since the Circuit Court went out of its way to reiterate the narrowness of its holding and to once again dispel the Commission's oft-stated, but legally unsupported fears. *WNCN*, *supra*, 610 F.2d at 851-52, FCC App. 25a-26a, previously quoted at p. 25 *supra*.

⁸⁰See, e.g., ABC Br. 11, 18 n. 44, 40 n. 100, 66; FCC Br. 22, 43 n. 28.

⁸¹There the question was whether the Commission had amassed any evidence to support its decision to *protect* certain specified kinds of programming - i.e., movies, sports and series shows - on commercial television, by prohibiting their exhibition on pay cable. The antithetical quality of the Commission's opposing and inconsistent positions on the anti-siphoning rules and the format cases did not go unnoticed by the court. *HBO*, *supra*, 567 F.2d at 29.

which was and is not there, rendering its "solution" to the *WEFM* problem unnecessary and irrelevant, as well as "arbitrary and capricious" within the meaning of the A.P.A.⁴²

3) Failure to Consider Means of Implementing *WEFM*

Closely related to the Commission's "pervasive" mischaracterization of the format decision was its "failure to implement the cases so as to minimize their drawbacks while preserving their essence." *WNCN, supra*, 610 F.2d at 852, FCC App. 27a. The *Inquiry* graphically illustrates this fact.

Although the Commission asked a number of specific questions⁴³ about how *WEFM* might be implemented⁴⁴ if it were to be followed, and although the

⁴²Judge Leventhal issued a concurring opinion on precisely this point. He wrote:

If hostility to a result leads an agency systematically to distort the testimony of witnesses on material matters, a court could not conscientiously sustain the agency decision. That is not unlike what the Commission has done in this case by distorting the meaning of our *WEFM* opinion, a matter Judge McGowan develops with some care. The court-agency partnership depends on mutuality of respect and understanding.

WNCN, supra, 610 F.2d at 860, FCC App. 45a (concurring opinion of Leventhal, J.) (footnotes omitted).

⁴³The questions, including inquiry relating to how to define formats, how much public grumbling is necessary, etc., appear in the *Notice of Inquiry*, 57 F.C.C.2d at 584-85, FCC App. 70a-71a, and are reproduced in *WNCN, supra*, 610 F.2d at 844, FCC App. 9a n. 14.

⁴⁴Those questions were directed only to "parties who favor some degree of government involvement," *Notice of Inquiry*, 57 F.C.C.2d at 584, FCC App. 69a, a hardly encouraging invitation, since the Commission had already clearly expressed its antipathy toward any such involvement.

answers to those questions would have alleviated the Commission's fears of administrative nightmares,⁴⁵ chilling effect on licensee innovation,⁴⁶ the requirement of pervasive regulation,⁴⁷ and the like, the Commission clearly never even looked at the proposed answers, having decided at the outset that "the course charted by the Court may lead only to expense, delay and stagnation" *Notice of Inquiry*, 57 F.C.C.2d at 584, FCC App. 69a.

The Commission's failure to seriously consider material before it,⁴⁸ especially where that material would have aided it in implementing rather than disobeying the binding statutory interpretation⁴⁹ of the Court of Appeals is yet another indication of the Commission's arbitrariness in the proceeding,⁵⁰ and in the resulting irrationality and insupportability of its decision.

⁴⁵For example, the Comments of the WNCN Listeners Guild suggested clear guidelines for when hearings should be held by a quantification of the requisite public grumbling, how burdens should be apportioned, how financial viability could be resolved, and the like. See JA 206-225.

⁴⁶The Guild, among others, has always been willing to accept a Commission-defined "grace period" for experimentation with new formats so that a licensee could feel free to engage in such experimentation for some period of time - perhaps a year or 18 months - before the *WEFM* decision would come into play.

⁴⁷Given the extremely limited number of hearings which would have occurred under, e.g., the Guild's proposals, see note 85 *supra*, the Commission could hardly worry about "pervasive regulation."

⁴⁸As the court below pointed out, the Commission "has not suffered from the want of suggestions" on how to do so, citing the abundance of scholarly comment and Commissioner Hooks' concurring statement in the *Notice of Inquiry*, *WNCN, supra*, 610 F.2d at 852 & n. 38, FCC App. 28a & n. 38, as well as the comments filed in the *Inquiry*, *id.* at 850 n. 33, FCC App. 23a-24a n. 33.

⁴⁹A court's interpretation of the statute under which an agency operates is, of course, thereafter binding on the agency. See, e.g., *Allegheny General Hospital v. NLRB*, 608 F.2d 965, 969-970 (3d Cir. 1979).

⁵⁰As the court found, rather than formulating appropriate and workable rules, the Commission simply "threw up its hands." *WNCN, supra*, 610 F.2d at 853, FCC App. 28a.

4) Reliance on Undisclosed Material

The court found that the Commission's reliance on the undisclosed secret studies, see discussion, *infra*, cast doubt on the rationality of its decision since, *inter alia*, those studies were never subject to comment, analysis or refutation. *WNCN*, *supra*, 610 F.2d at 846-47, FCC App. 14a-17a.

The decision below, casting the Commission's procedural errors under the arbitrary and capricious standard, is consistent with this Court's holding that the "adequacy" of a record to support an agency's findings

turns on whether the agency has followed the statutory mandate of the Administrative Procedure Act or other relevant statutes.

Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, 435 U.S. 519, 547 (1978) [*Vermont Yankee*].

This emphasis on procedural defect as negatively affecting substantive result is supported by the leading commentator on administrative law, who has recently written:

Substance and procedure are not cleanly separable; they often overlap. What is procedurally bad may for that reason be substantively bad. For instance, when an agency failed to make its study public until after the close of the comment period, a court found lack of substantial evidence in support of the rule because, the court said, some of the evidence was "not exposed to the full public scrutiny which would encourage confidence in its accuracy." *Aqua Slide 'N' Dive Corp. v. Consumer Products Safety Commission*, 569 F.2d 831, 842 (5th Cir. 1978).

Davis, *Administrative Common Law and the Vermont Yankee Opinion* 1980 Utah L. Rev. 3, 16.⁹¹

C. The Policy Statement Is Invalid Because It Was Enacted in Violation of Statutory Procedure and Due Process Law

While the court below did not find it necessary to rest its decision on the procedural errors in the *Inquiry*,⁹² it is clear that under well settled law those errors are sufficient, in and of themselves, to require invalidation of the *Policy Statement* under § 706(D).⁹³

⁹¹Although Davis's article suggests ways to read this Court's *Vermont Yankee* decision so as to preserve, *inter alia*, a court's ability to review procedural irregularities in general, such a reading is not necessary here where the defects clearly violate the A.P.A. and fall squarely within the language of *Vermont Yankee*. See pp. 50-53 *infra*.

⁹²The court saw no need to decide the question because the procedural violations were also symptomatic of the arbitrariness with which the Commission acted throughout. *WNCN*, *supra*, 610 F.2d at 847 n. 24, FCC App. 17a n. 24. Judge Bazelon, however, issuing a concurring opinion, wrote:

The Commission's failure to make public the staff study that proved so central to its final decision violates fundamental rulemaking principles. As the majority opinion documents, the FCC exhibited an almost cavalier disregard for the public's right to comment on the critical data and methodology supporting the Commission's finding that 'market forces had provided a significant even if not perfect amount of diversity.' This conclusion in turn is a vital link in the Commission's reasoning underlying its adoption of the *Policy Statement*. I believe therefore that the record must be reopened to permit meaningful public participation in the Commission's decision.

WNCN, *supra*, 610 F.2d at 858, FCC App. 41a (concurring opinion).

⁹³We do not understand this Court's decision in *Vermont Yankee* to affect or limit § 706(D). The holding that agencies are not required, as a general matter, to employ procedures *beyond* those required by the A.P.A. in no way implies that a reviewing court need not be assured that § 553 was complied with. Rather, *Vermont Yankee*'s almost *sole* reliance on the procedures provided by the A.P.A. makes it even more critical that the agency provide, and the court scrupulously review, adherence to the statute.

Of the many violations of the A.P.A. and due process, and the continued "hostility and indifference" to the public interest groups,⁹⁴ the inclusion of, and reliance on studies whose existence was unknown prior to the decision, and which were *never* subject to public analysis or rebuttal, stands out.⁹⁵ To understand the significance of the studies and the direct A.P.A. violation which their use entailed, it is necessary to review briefly the procedural record below.

⁹⁴For example, no motions for extensions of time clearly needed by understaffed and underfinanced citizens' groups were granted, while all requests for procedural relief made by broadcasters were. This was particularly acute in the matter of reply comments; since most out-of-town citizens' groups were unable to go to Washington to review the contents of comments which had been filed, they requested a brief extension until shortly after the scheduled publication of the issue of *Access* magazine which was to summarize those comments. The motion was denied, and, as a result, not one out-of-town group filed reply comments, though virtually all the broadcasters and industry groups did. See also note 104 *infra* for more examples.

⁹⁵Commissioner Fogarty, dissenting from the Commission's decision to petition for *certiorari* in this case, wrote:

the procedural infirmity inherent in the Commission's failure to afford notice and opportunity for comment on the so-called OPP "Secret Study" is a fatal flaw.

* * *

The failure to give public notice and opportunity for comment on the OPP study was not merely harmless error; that failure goes to the integrity and fairness of the Commission's decision-making process.

Fogarty dissent, WNCN Opposition to Petitions for Certiorari, Appendix A, at 1a-2a.

1) The Secret Studies

Shortly after the *Notice of Inquiry* was issued, Citizens Communications Center [Citizens] filed a pleading⁹⁶ calling upon the Commission to carry out or contract for a study which would provide empirical data on existing formats, changes which had occurred before and after *Atlanta* and *WEFM*,⁹⁷ ownership and finances of radio stations in the major markets, and other information critical to the *Notice's* assumptions⁹⁸ and the Commission's ultimate determination.⁹⁹

⁹⁶This was the Petition to Reconsider, Rescind, Suspend or Redirect Inquiry, JA 145. It pointed out that the *Inquiry* was no more than an attempt to overturn the Court of Appeals' decision by appealing it not to this Court or Congress, but to the broadcasters. In addition to the request for an empirical study, it asked, *inter alia*, for the Commission to "undertake affirmative measures to involve local participants" which, of course, the Commission never did. (JA 145 *et seq.*)

⁹⁷Such information was and is critical to the Commission's oft-stated, but thus far unsupported belief that the existence of the format decision stifles and deters licensee experimentation with new formats.

⁹⁸Citizens pointed out what has remained a major flaw in the Commission's blind reliance on untested marketplace economics. It wrote:

the Commission relies on a marketplace theory of format changes, but provides no data on the workings of the marketplace. How many multiple-owned radio stations operate at a loss? What is the extent of inefficient diversity - wasting AM-FM duplication in cities where format changes are under protest? How can deference to a selective ratings system controlling the format marketplace be reconciled with the public interest standard? How do non-commercial stations fit into the marketplace?

(JA 156.)

⁹⁹In the alternative, Citizens asked for sufficient time to allow listeners to conduct such studies themselves to the extent that resources and information were available to them. It also requested reimbursement to such groups if the Commission declined to make or contract for the requisite studies.

In denying that pleading, the Commission clearly stated its view that no such study was necessary.¹⁰⁰

Citizens then filed a Freedom of Information Act [FOIA] request for data underlying the assumptions in the Commission's *Notice of Inquiry*. The response was essentially that there was no such data (JA 52).¹⁰¹

When, however on July 30, 1967, the Commission finally issued its *Policy Statement*, the Commission relied heavily¹⁰² on two "staff studies" which purported to demonstrate the adequacy of the marketplace in providing "a bewildering diversity of formats" and in providing maximum "consumer satisfaction."¹⁰³ The conclusion of the studies was attached as an exhibit to the *Policy Statement*, 60 F.C.C.2d at 872-81, FCC App. 156a-170a, but the data from which it was derived was not.

The existence of these studies, much less the probability that the Commission would rely on them,

¹⁰⁰The Commission left open the possibility of calling for such a request after all the comments were in, if those comments did not provide satisfactory data upon which to make a decision (JA 169).

¹⁰¹The *Notice* had included an Appendix purporting to show the diversity of formats existing in three major markets; the FOIA response explained that this "data" was obtained from BROADCASTING YEARBOOK, an industry publication. Even this incredibly limited and inherently meaningless "data" was inaccurate. As Citizens pointed out, the list failed to include an all-jazz format in New York after the Commission had been asked to review a transfer application seeking to abandon that very unique format (JA 155).

¹⁰²The Commission's reliance on the studies is demonstrated not only in the *Policy Statement*, 60 F.C.C.2d at 863, FCC App. 129a, but in its denial of reconsideration as well, 66 F.C.C.2d 67, 84-85, FCC App. 176a, 189a-192a. Judge Bazelon saw the studies as a "vital link in the Commission's reasoning underlying its adoption of the *Policy Statement*," WNCN, *supra*, 610 F.2d at 858, FCC App. 41a, and the majority likewise sees the studies as "[h]aving] a major influence on the decision," *id.* at 846, FCC App. 14a. See the court's discussion of this issue at 610 F.2d 846-47, FCC App. 14a-17a.

¹⁰³See note 45 *supra*.

had been entirely unknown prior to the issuance of the *Policy Statement*. This critical point was made by the Guild in a petition for reconsideration¹⁰⁴ which requested an opportunity to respond to the studies once the underlying data was made available.

Simultaneously, Citizens filed an FOIA request for that data so that the public might be able to analyze and criticize the studies and their conclusion (JA 68).¹⁰⁵ Citizens also wrote to the Commission requesting that the *Inquiry* be reopened until the FOIA request was resolved, and the public given an opportunity to comment (JA 70).

Although the Commission responded to the FOIA request by turning over numerous pages of virtually unintelligible computer print-outs,¹⁰⁶ it did so sub-

¹⁰⁴The Commission allows petitions for reconsideration to be filed within 30 days of a decision. 47 CFR § 1.106(f) (1978). The standard of persuasion on such petitions, is by regulation, far greater than in the initial proceeding. 47 CFR § 1.106(e) (1978).

Nevertheless, a number of groups asked the Commission to reconsider its decision, some on the ground that although they were vitally interested in the issue, had valuable and relevant information and insights to offer, they had not even known of the existence of the *Inquiry* until the decision was announced. See, e.g., JA 381. Their requests were, of course, ultimately denied.

Other petitioners for reconsideration alleged that their timely comments had never been considered and did not appear on the list of "Parties Filing Comments" attached to the *Policy Statement* (JA 392), or that the Commission had failed to send a copy of the *Notice of Inquiry* although specifically asked to do so (JA 350).

¹⁰⁵The FOIA request asked for any materials which show the date on which the study was first requested within the Commission, the circumstances surrounding such institution of the study, and the dates covered by the study.

(JA 68).

¹⁰⁶In a subsequent letter to the Commission, Citizens pointed out that the material furnished was totally useless in and of itself (JA 100), a fact with which the Court of Appeals, viewing the print-outs (JA 76-87), quite reasonably agreed.

stantially after the time for filing petitions for reconsideration had passed.¹⁰⁷ Citizens appealed the overly limited response to its FOIA request,¹⁰⁸ and on November 24, 1976 the Commission denied the appeal.

In March of 1977, Citizens wrote the Commission stating that it and other public interest groups were entirely unable to do any analysis of the studies because the Commission failed to provide a directory to explain what the data in the computerized print-out means.

(JA 100).

Sometime thereafter, with the actual date the subject of extreme and unresolved controversy,¹⁰⁹ the Commission placed a "Description of the Data Base" in its files. It is, however, undisputed that this was done long after the time for filing for reconsideration was past; this time was never extended, since the

¹⁰⁷The exact timing is not clear, as is the case with so many critical facts in this record. The Commission's "answer" is dated September 15, 1976 (2 weeks after the deadline for reconsideration) but the computer print-out material placed in its public file, reproduced in the Joint Appendix below, bears the date December 6, 1976 on every page (JA 76-87). All petitions for reconsideration were filed on or before August 29, 1976.

¹⁰⁸For example, the Commission declined to furnish any information about when the studies had been made, or who had made them (JA 73). See note 105 *supra*. The point of this request was, obviously, to determine whether the Commission had deliberately misled the public in its earlier denials.

¹⁰⁹The Commission claims to have done this on March 30, 1977, and produced a letter to that effect at oral argument in the D.C. Circuit. The letter was not, however, part of the Appendix, and no one from Citizens had ever seen it prior to argument. No public interest group, including any of the respondents here, had ever seen the "Description" until the Commission placed it at the end of the second volume of the Joint Appendix. Significantly, the "Description" does not appear in the Certified List of Documents filed with the Court of Appeals in the late fall of 1977, after the Commission's final order denying reconsideration.

Commission refused to grant Citizens' previously described request to reopen or hold the *Inquiry* open until the studies had been commented upon.

Accordingly, no listener or public interest group was ever able to rebut or challenge¹¹⁰ critical evidence relied upon by the Commission, although upon full examination the studies appear hopelessly methodologically flawed¹¹¹ with "data" which in no way supports the conclusions drawn by the staff and subsequently by the Commission.¹¹²

¹¹⁰Petitioners make much of the fact that the studies have not been rebutted or shown to be inaccurate, see e.g. FCC Br. 40; ABC BR. 36-37 n. 87, completely ignoring the fact that there has been no forum in which to do so. Since the necessary material was not available to make the appropriate "comment" during the pendency of the Commission's proceeding, there was no way, within the constraints of judicial review of an agency record, to submit rebuttal or criticism to the Court of Appeals. The Petitioners show either surprising ignorance or lack of respect for the most basic principles of appellate review by their unfounded and irrelevant criticism.

¹¹¹First, the Commission violated the most fundamental scientific methods by failing to disclose the equation used as the basis of its statistical analysis, and upon which the outcome of its whole study was dependent. See H. Kelejian & W. Oates, *INTRODUCTION TO ECONOMETRICS*, 92-98 (1974). Without the equation, no interested party could assess the validity of the statistical results -- i.e. coefficients, standard errors, and F-statistics.

The Commission's method of data selection violated the most fundamental methodological requirement of empirical scientific study -- that of random selection of data. Rather than selecting from a cross section of all radio markets, the Commission chose only the top 25, omitting all medium and small markets, thus invalidating any inferences concerning the general nature of the relationship between formats and audience size.

Finally, although the Commission's study included 147 stations, it obtained information about only 100. Any correlation between format types and audience shares lacks statistical validity where one-third of the stations are assigned a zero value for their audience shares. Significantly one of those stations for whom information was omitted was WNCN itself.

¹¹²See the court's discussion in *WNCN*, *supra*, 610 F.2d at 856-57, FCC App. 35a-37a.

2) Reliance on Undisclosed Material Violates § 553 of A.P.A.

Where agencies engage in informal rulemaking, the applicable section of the Administrative Procedure Act, 5 U.S.C. § 553 requires a three-step procedure in agency rulemaking: notice to the public, an opportunity for interested parties to comment, and a decision based on "consideration of the relevant matter presented." Within this three-step procedure, the notion of fundamental fairness is entirely applicable, since

the reviewing court must satisfy itself that the requisite dialogue between the agency and the public occurred and that it was not a sham.

Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 381 (1974) [Wright].¹¹⁴

It is well settled that the "comment" requirement of Section 553 includes an opportunity to rebut, challenge or otherwise speak to all relevant material prior to the agency's decisions.¹¹⁴ See e.g., Wright, *supra* at 379-81; Davis, *Administrative Law in the Seventies* (1976) § 601-1 (Supp. 1977); *United States v. Nova*

¹¹⁴ The Wright article was cited with approval in *Vermont Yankee*, *supra*, 435 U.S. at 547 n. 20.

¹¹⁵ This interpretation of the "comment" requirement of the A.P.A. in no way conflicts with *Vermont Yankee*. A footnote in that opinion is a statement by the Nuclear Regulatory Commission describing the procedures used, the fact that no evidentiary material would have been received under different procedures, and the further fact that the petitioner had made not even a suggestion of what other substantive matters it might develop under another procedure. Not only were all documents made available well in advance of the hearing, but the staff also made available its drafts and handwritten notes, *id.* at 530 n. 7.

Compare this with the deliberate withholding of information in the instant case.

Scotia Food Products Corp., 568 F.2d 240, 249-52 (2d Cir. 1977); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1259-61 (D.C. Cir. 1973). Cf. *HBO*, *supra*.¹¹⁵

Once data, or conclusions from data, or any study are "relied" upon by the agency, the participants must be furnished with that material as soon as it is practicably available, *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), and must be given an opportunity to analyze and comment on the material as well as to challenge or otherwise comment upon the methodology employed in obtaining it. E.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 632 (D.C. Cir. 1973); *South Terminal Corp. v. EPA*, 504 F.2d 646, 664, 666 (1st Cir. 1974).

In the instant case, as the Court of Appeals more gently noted, the Commission flagrantly violated both the letter and the spirit of the A.P.A. -- as well as the most basic notion of due process -- by failing to reveal the information upon which it ultimately relied in making its determination. This fundamental error was exacerbated both by the Commission's repeated reassurances to public interest groups prior

¹¹⁶ In *HBO* a divided panel of the Court of Appeals set aside an agency decision because of extensive *ex parte* contacts -- i.e., another form of "evidence" or information which might be considered by an agency without the opportunity for all interested parties to "comment." The rule against *ex parte* communications has been reiterated after the *Vermont Yankee* decision, see e.g., *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 539 (D.C. Cir. 1978), thus firmly grounding it in the notice and comment requirement of § 553, see Stewart, *Vermont Yankee and the Evolution of Administrative Procedure* 91 Harv. L. Rev. 1805, 1816-17 n. 49. Other Circuits have adopted a similar interpretation.

to the decision that no studies were needed or contemplated,¹¹⁶ and by its failure to provide necessary information to permit any meaningful comment on the studies *after* its decision.¹¹⁷

Respondents believe that under the A.P.A. and this Court's decision in *Vermont Yankee*, an agency decision may not be upheld where it has been made in a procedure so flagrantly violative of the statute and fundamental fairness.

It should also be recalled that in at least three of this Court's major communications law decisions, the issue of an improper or otherwise procedurally inadequate record has been lurking on the background¹¹⁸ but has not required decision. Here, the situation is quite different.

In *Sanders Bros.* this Court noted respondent's contention that

the Court used as evidence certain data and reports in its files without permitting respondent . . . the opportunity of inspecting them.

"These 'reassurances' were made in response to various pleadings filed by the public interest groups. See p. 46 *supra*."

No information about the studies was provided until after the period for filing reconsideration petitions had passed, although requests were promptly and properly made. The Commission refused to reopen the record to permit comment although specifically requested to do so and ultimately denied reconsideration, continuing to rely on the untested studies (FCC App. 183a, 191a). Compare this situation with that in *Vermont Yankee* where this Court wrote:

ACRS was not obfuscating its findings. The reports to which they referred were matters of public record, on file in the Commission's public document room . . . not one member of the supposedly uncomprehending public even asked that the report be remanded.

445 U.S. at 556-557.

"This suggests, in an only slightly different context than that discussed in *UCC II*, that the Commission may be less than scrupulous in permitting interested parties to actually and effectively participate in its proceedings

Id. at 477-78. Because the Commission disavowed the *use* of such materials *and* the Court of Appeals found the disavowal "veracious" this Court was not "disposed to distort its conclusion." Here, of course, the Commission does not disavow use, and the Court of Appeals found the Commission lacking in candor.

In *NCCB*, the Commission relied on a study based on an annual programming report which was not available at the time comments were filed. This Court wrote:

The United States suggests that the Commission could not properly have relied on this study since it was not made available to the parties for comment in advance of the Commission's decision. Brief of United States 46 n. 39. No party petitioned the Commission for reconsideration on this ground, nor was the issue raised in the Court of Appeals or in any of the petitions for certiorari, and it is therefore not before us.

436 U.S. at 807 n. 27.

Here of course, the Guild petitioned for reconsideration on this ground, and not only raised the issue, but had it decided in its favor of the Court of Appeals.

Finally, in *NBC v. U.S.*, *supra*, this Court specifically noted that it reached the merits only because

there is no basis for any claim that the Commission failed to observe procedural safeguards required by law.

319 U.S. at 225. As the instant case varies from all those discussed here, so also should the necessity to review the Commission's procedural failures and invalidate the *Policy Statement* on that ground.

POINT II

The Decision of the Court of Appeals Is Premised Upon and Compelled by the Regulatory Scheme Enacted by Congress in the Communications Act and the Consistent Interpretations of That Act by This Court and the FCC.

As already discussed,¹¹⁹ the WNCN decision is grounded in a statutory scheme which requires that a public interest determination be made by the Commission when passing upon all license applications, whether for an initial grant, transfer or renewal.¹²⁰ A hearing must be held whenever a substantial and material question is presented,¹²¹ and the Commission may only grant those applications which it affirmatively finds would serve the public interest. The primacy of this statutory scheme has been consistently reiterated by this Court and by the D.C. Circuit.¹²²

In *Ashbacker*, this Court held that the Commission may not deviate from the statutory requirement of a hearing, even if it believes an alternative procedure to be preferable.

[W]e are not concerned here with the merits. This involves only a matter of procedure. Congress has granted applicants a right to a hearing on their applications for station licenses. *Whether that is wise policy or whether the procedure adopted by the Commission in this case is preferable is not for us to decide.* We only hold that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him.

Id., 326 U.S. at 333 (footnotes omitted) (emphasis added).

¹¹⁹See discussion at Point I [A] at pp. 29-31 *supra*.

¹²⁰47 U.S.C. § 309(a).

¹²¹47 U.S.C. § 309(d)(2), (e).

¹²²That court is "the sole forum for appeals from FCC licensing decisions." *WEFM, supra*, 506 F.2d at 266. See 47 U.S.C. § 402(b).

Of course, these constraints leave ample room for the Commission to adopt rules and policies of general application,¹²³ provided that they do not override the Commission's duty to weigh each license application under the public interest standard and to hold a hearing when the Act so requires. Thus, in upholding the Commission's decision not to require divestiture of most existing newspaper-broadcast ownership combinations, this Court emphasized that the Commission would continue to consider "issues relating to concentration of ownership . . . on a case-by-case basis in the context of license renewal proceedings" and that the rights of competing applicants and petitioners to deny would not be abridged. *NCCB, supra*, 436 U.S. at 788 n. 12, 791 n. 13, 809.

Similarly, the D.C. Circuit has held that the Commission's power to adopt general rules must be "linked to the existence of a safety valve procedure." *WAIT Radio v. FCC, supra*, 418 F.2d at 1157.

That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases.

Id. And in *UCC I*, where the Commission had denied a hearing on "policy" grounds, the Court of Appeals reversed, noting that a policy determination which may be "valid in the abstract" would still call for "explanation in its application." *Id.* at 1008.

A. The Commission's Format Policy Violates the Statutory Scheme

1) The Format Cases

Despite the express provisions of the Act and the clear mandate of *Ashbacker*, for ten years the

¹²³See 47 U.S.C. §§ 303(r) & 154(i).

Commission has refused to abide by the statutorily prescribed procedures in dealing with listener-filed petitions to deny transfer applications involving the loss of unique formats, culminating in the *Policy Statement* here under review.

The history of the format cases has already been set forth.¹²⁴ Here we need only summarize the D.C. Circuit's position in order to better understand precisely how the Commission's essentially intransigent policy violates the statutory scheme.

In its format decisions, the D.C. Circuit held that "preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest."¹²⁵ A petition to deny a transfer which would entail the loss of a unique format thus raises issues material to the public interest which must be weighed by the Commission in making its required public interest finding.¹²⁶ And when such a petition presents substantial questions of fact as to the uniqueness of the endangered format, its economic viability, or the impact on the listening audience of its loss -- or if the Commission is otherwise unable to discern whether approving the transfer would serve the public interest -- a hearing must be held.¹²⁷

The Court of Appeals was careful to note that its decisions did not create any special rules or policies for dealing with format changes.

We treat format changes no differently from any other element affecting public interest.

¹²⁴See discussion at pp. 12-17 *supra*.

¹²⁵*WEFM, supra*, 506 F.2d at 268.

¹²⁶*E.g., Progressive Rock, supra*, 478 F.2d at 930.

When we say that a format change is of public interest proportions we mean that it must be considered by the Commission in its ultimate determination of public interest.

¹²⁷*E.g., id.* at 929-30, 933-34; *WEFM, supra*, 506 F.2d at 260-62.

If there are factual disputes, as there were in [Atlanta], then a hearing must be held. If there are none -- for instance the financial viability of the existing format and the alternative sources of that format may be undisputed, so that the Commission is faced only with balancing the competing interests with known and unchallenged factors, and thus determines where the public interest lies -- then no hearing is required.

Progressive Rock, supra, 478 F.2d at 930 (footnotes omitted).

These holdings are summarized in Part I A of the Court of Appeals' *WNCN* opinion, 610 F.2d at 842-843, FCC App. 4a-8a.

2) *The Commission's Position -- From Glenkaren¹²⁸ to the Policy Statement*

It is important to understand the precise nature of the decade-long disagreement between the Commission and the Court of Appeals. At the outset, it should be understood that the FCC has never attempted to refute the principles on which the analysis of the Court of Appeals is founded.

The Commission has not disputed, and does not now dispute, that the Act requires that it approve a transfer application only upon finding that the transfer would serve the public interest, and that a hearing is mandated whenever a substantial and material fact question bearing on the public interest is presented. Nor does the Commission deny that diversity of entertainment formats is in the public interest. Indeed, the *Policy Statement*, consistent with innumerable earlier and contemporaneous pronouncements

¹²⁸*Glenkaren Associates, Inc.*, 14 RAD REG 2d (P&F) 104 (1968), reconsideration denied, 19 F.C.C.2d 13 (1969), *rev'd sub nom. Citizens Committee to Preserve the Voice of the Arts in Atlanta (WGKA-AM & FM) v. Fcc.*, 436 F.2d 263 (D.C. Cir. 1970).

on the importance of diversity,¹²⁹ acknowledges that the listening public is "entitled" to such format diversity.¹³⁰

Having thus accepted the very premises upon which the format cases were based, how is it that the Commission has intransigently refused to acquiesce in their teachings? The simple answer is that the FCC has essentially disregarded the issue which the Court of Appeals addressed in the format cases.

While the court focused on the necessity of considering the interests of the listeners of the existing format in determining whether to approve the transfer, the Commission's decisions presupposed that the transfer would take place and discussed only whether the transferee could be required to retain that format. It concluded in *Glenkaren* that so long as the proposed programming of the transferee could be said to serve the public interest,

the matter is one for the judgment of the broadcaster and the Commission, in these instances, cannot properly insist that the prior format must be retained.¹³¹

In *Zenith Radio Corp.*, *supra*, Commissioner Johnson's dissent clearly identified the Commission's failure to come to grips with the principles of *Atlanta*.

After refusing to investigate in order to determine the requisite facts, the majority concludes that "There has been no showing here that the format . . . chosen by the assignee in the exercise of its discretion, is not reasonably attuned to the tastes and needs of the Chicago listening public." Given [*Atlanta*], that is truly a bizarre statement . . .

¹²⁹See, e.g., notes 21 & 22 *supra*, and the discussion at pp. 6-10 *supra*.

¹³⁰*Policy Statement*, 60 F.C.C.2d at 863, FCC App. 128a. See also FCC Br. 23, 34.

¹³¹See *Glenkaren Associates Inc.*, *supra*, 14 RAD REG. 2d (P&F) at 105-10.

[W]hether or not the proposed . . . format is reasonably attuned to the tastes and needs of the Chicago public is not, under [*Atlanta*], the relevant inquiry . . . [T]he Court's primary point was that the mere fact that a format appeals to a majority in the community does not insulate the format change from further scrutiny. Rather, [*Atlanta*] demands that when a station's proposed format change will decrease the diversity of broadcast formats within a given community, the [FCC] must determine whether that resulting decline can possibly serve the public interest. As the [*Atlanta*] Court explained, we cannot make that determination simply by stating that a majority of the community would probably prefer the new format to the old.

Yet, that is precisely what the majority does today.¹³²

The unresponsiveness of the Commission's arguments to the holdings of the Court of Appeals thus reflects what the court refers to as the FCC's previously discussed "drastic misreading"¹³³ of the format cases. *WNCN*, *supra*, 610 F.2d at 850, FCC App. 23a.

Like those arguments, the Commission's contentions, both in its *Policy Statement* and in its brief to this Court, are addressed to nonexistent holdings very different from those which are actually contained in the format cases and in *WNCN*. "The truth is that the actual features of *WEFM* are scarcely visible in [the Commission's] highly-colored portrait." *WNCN*, *supra*, 610 F.2d at 851, FCC App. 24a. When the "straw man" posited by the Commission is set aside, and the actual holdings of the Court of Appeals are examined, the Commission's arguments fall away.

¹³²*Zenith Radio Corp.*, *supra*, 38 F.C.C.2d at 850 (dissenting opinion).

¹³³See discussion at pp. 38-40 *supra*.

3) *Commission Errors Based on Misconceptions of the Cases and the Statutory Scheme*

Understanding the true basis of the Commission's difference with the decisions of the Court of Appeals, especially *WEFM*, and with the statutory scheme they expound makes it possible to dispose of many of the subsidiary issues the Commission has raised here and elsewhere.

The Commission is not being asked to play the role of "national arbiter of taste"¹⁴¹ nor to "determine the relative values of two different types of programming in the abstract."¹⁴² The format decisions do not compel the Commission to force licensees to continue,¹⁴³ restore,¹⁴⁷ or abandon¹⁴⁸ particular formats, nor to "interfere with the broadcaster's selection of programming."¹⁴⁹ The Court of Appeals has made it painstakingly clear that it requires no such thing.¹⁴⁰

The format cases do not require the Commission to engage in a system of pervasive governmental regulation¹⁵¹ which entails "comprehensive . . . state

¹⁴¹See *Atlanta, supra*, 436 F.2d at 272 n. 7, reproduced at note 28 *supra*.

¹⁴²*Policy Statement*, 60 F.C.C.2d at 864, FCC App. 130a. See also FCC Br. 50.

¹⁴³*E.g., Policy Statement*, 60 F.C.C.2d at 860, FCC Br. 18, 25-26, 45, 48.

¹⁴⁴*E.g., Policy Statement*, 60 F.C.C.2d at 859-860, FCC App. 120a-121a, FCC Br. 18.

¹⁴⁵*E.g., Policy Statement*, 60 F.C.C.2d at 859-860, FCC App. 120a-121a, FCC Br. 26.

¹⁴⁶FCC Br. 52. See also *Policy Statement*, 60 F.C.C.2d at 860, FCC App. 123a.

¹⁴⁷*WNCN, supra*, 610 F.2d at 851-52, FCC App. 25a-26a, reproduced at p. 25 *supra*.

¹⁴⁸*Notice of Inquiry*, 57 F.C.C.2d at 582, FCC App. 65a.

surveillance,"¹⁴² as the Court of Appeals has also made clear.¹⁴³ The Commission's distorted fears or misapprehensions are carried over into their arguments here, but with the same lack of basis in either the format decisions or the statutory scheme.

The issue before this Court is not whether the policies upon which the Commission relies -- licensee discretion in format choice and reliance on marketplace forces -- are correct as a general matter. The Court of Appeals has consistently accepted their general validity.

As we have emphasized before and repeat today, *WEFM* was *not* intended as an alternative to format allocation by market forces. We fully recognized that market forces do generally provide diversification of formats. The licensee's discretion over programming matters is therefore very broad while the Commission's role is correspondingly narrow. However, we also recognized -- as does the Commission -- that the radio market is an imperfect reflection of listener preferences

Further, as is clear from our earlier cases, the Commission's obligation to consider format issues arises only when there is strong prima facie evidence that the market has in fact broken down.

WNCN, supra, 610 F.2d at 851, FCC App. 24a (footnote omitted). Rather, the issue in this case is whether those general policies may be applied indiscriminately and without regard to their effect in particular cases on the public interest, thereby overriding the con-

¹⁴²*Policy Statement*, 60 F.C.C.2d at 865, FCC App. 134a, citing *Lemon v. Kurtzman*, 401 U.S. 602, 619-20 (1971).

¹⁴³*WNCN, supra*, 610 F.2d at 850-52, FCC App. 23a-26a. See discussion at pp. 24-38 *supra*.

gressional licensing scheme which is based upon particularized public interest decisions for each license grant,¹⁴⁴ renewal and transfer.¹⁴⁵ The answer to this question has been unmistakably provided by this Court in *Ashbacker* and followed uniformly by the Court of Appeals. The congressional licensing scheme, including the procedures set forth in the Act for its implementation, may not be disregarded or circumvented in favor of some other policy or procedure, however preferable the Commission may believe the latter to be.

There is simply no authority under sections 308-310 of the Act for the Commission to abdicate its role in the licensing process to marketplace forces. Such abdication would mean that the private interests of the broadcasters, and to an even greater degree the advertisers, will determine the degree of program diversity to be provided to the public. Both the Commission and the Court of Appeals have recognized that this advertiser-dominated market is an imperfect one which tends to neglect the interests of all but the most demographically desirable consumers.¹⁴⁶

¹⁴⁴The issue of unique formats is, without question, considered by the Commission in license grant proceedings. *George Cameron Jr. Communications, supra*; see discussion at p. 9 *supra*.

¹⁴⁵Every licensee is subject to Commission scrutiny when it seeks renewal. See note 13 *supra*. Thus, although the licensee may be free under the Commission's general policy to select the entertainment format of his choice, where that choice -- or any change therein -- affects the public interest, it cannot escape such review by the Commission any more than other aspects of the licensee's programming can.

The situation is even clearer in the transfer context, where the proposed transferee is merely a prospective licensee. He is obviously free to make whatever programming -- including format -- proposals he wishes; but he has no right to be the licensee, and his proposals will be scrutinized by the Commission along with all other relevant matters in order that it can decide whether the proposed transfer would serve the public interest.

¹⁴⁶See note 35 *supra*.

It may be that it is generally expedient to allow competitive forces to govern most programming choices, but the Commission should not, and statutorily may not lose sight of the proper relationship of competition to the regulatory scheme of licensing in the public interest.¹⁴⁷ When confronted with evidence that the market has failed in a particular instance the Commission may not, consistent with its duties under the Act, refuse to even consider the impact of that failure on the paramount rights of the public.

The Court of Appeals has not attempted to dictate to the Commission the manner in which it is to look, what it is to find, or how it is to weigh what it finds in the discharge of its duties. All it has done is admonish the Commission that it may not refuse to look at all; this the Act clearly demands. Any change in this arrangement must come from Congress,¹⁴⁸ not the Commission.

B. The Court of Appeals Decision Is Consistent with and Supported by the Consistent Interpretations of the Communications Act by This Court and the Commission, and by the Act's Legislative History

The Court of Appeals' decisions in the format cases and in *WNCN* are thoroughly and carefully grounded not only in the Act itself, but also in the consistent interpretations of the Act in cases decided by this Court, and in the policies, rules and decisions

¹⁴⁷As Justice Frankfurter found, competition may serve merely to provide "complementary or auxiliary support" to the basic regulatory scheme. *RCA, supra*, 346 U.S. at 93.

¹⁴⁸Congress has been considering "deregulatory" legislation for several years, and has before it several bills which would alter the present statutory mandate for consideration of format changes in making public interest determinations in connection with licensing applications. S. 611, 96th Cong., 1st Sess. § 301 (1979); S. 2827, 96th Cong., 2d Sess. § 307 (1980).

of the FCC dating back to the earliest days of radio regulation. Moreover, the Act's legislative history in no way bars the Commission from complying fully with the holdings of the Court of Appeals.

1) Decisions of This Court

This Court's decisions have uniformly interpreted the Act in the manner previously discussed,¹⁴⁹ and fully support the Court of Appeals holding that, under the comprehensive regulatory scheme enacted by Congress, each licensing decision must be based upon an affirmative finding that the grant would serve the public interest.¹⁵⁰

Petitioners contend, however, that this Court's decision in *Sanders Bros.* recognizes a statutory policy of "free competition" which precludes the Commission from taking format changes into account in its public interest deliberations.¹⁵¹ In addition, they urge that the Court of Appeals decisions, by violating this alleged *Sanders Bros.* policy, would impose common-carrier obligations on broadcasters in derogation of this Court's holdings in *Sanders Bros.*, *CBS v. DNC*, and *Midwest Video II*.¹⁵² These contentions are without merit.

Despite the Commission's long-standing¹⁵³ reliance on *Sanders Bros.*, the logic of that case in fact strongly

¹⁴⁹See also the discussion in Point I [A] at pp. 29-31 *supra*.

¹⁵⁰*E.g.*, *NBC v. U.S.*, 319 U.S. at 225; *Ashbacker*, *supra*, 326 U.S. at 329-33.

¹⁵¹FCC Br. 8, 23-24; ABC Br. 41-42; Insilco Br. 21-22.

¹⁵²FCC Br. 24-26; ABC Br. 42-43.

¹⁵³The FCC has made the identical argument in *Atlanta* (Brief for Appellee at 19) and *WEFM* (*Burch Statement*, 40 F.C.C.2d at 230), and in the *Notice of Inquiry* (57 F.C.C.2d at 580-81, FCC App. 61a-62a), the *Policy Statement* (60 F.C.C.2d at 860-61, FCC App. 122a-123a), and the *Denial of Reconsideration* (66 F.C.C.2d at 79-80, FCC App. 178a-180a).

supports the decision below. In *Sanders Bros.* this Court held¹⁵⁴ that "resulting economic injury to a rival station" is not a factor to be weighed by the FCC in passing on a license application except insofar as the public interest is affected by it.¹⁵⁵ Thus the Commission could not deny the listeners of a community the benefits of an additional broadcast service merely because an existing licensee would suffer economic loss from the resulting increase in competition.

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public.¹⁵⁶

But where it is shown that additional competition *would* have an adverse impact on the public, the Commission "does not disregard" the question of competition.¹⁵⁷

Thus, the import of *Sanders Bros.* is that the FCC's duty is to assure, through its licensing decisions, that the public is well served -- as by having the increased service and diversity which an additional local outlet would bring -- even if doing so will visit economic

¹⁵⁴The Commission's characterization of the language it quotes as being the "holding" of *Sanders Bros.* is inaccurate. See *Policy Statement*, 60 F.C.C.2d at 860, FCC App. 123a.

¹⁵⁵309 U.S. at 473.

¹⁵⁶*Id.* at 475. This language has been consistently and pointedly omitted from the Commission's frequent citation of and quotation from *Sanders Bros.*, see note 51, *supra*, including its brief herein, FCC Br. 8, 23-24. Petitioners ABC *et al.* also omit this language, ABC Br. 41-42; Petitioners Insilco *et al.* include it, but do not address its import in the present case, Insilco Br. 21-22.

¹⁵⁷309 U.S. at 475-76. Thus *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) held that the Commission must afford an existing licensee the opportunity to present proof that the economic effect of granting a license for an additional station in its geographical location would be detrimental to the public interest. This has come to be referred to as a "Carroll issue," and is an established part of Commission practice.

injury on broadcasters. But the Commission would have this Court read *Sanders Bros.* as if it had held that the Commission must assure broadcasters the economic benefits of freedom from regulation even if to do so would cause the public to be ill-served. This is precisely contrary to this Court's actual holding, which is fully consistent with and supportive of *WNCN*.

As the Court of Appeals noted in *WEFM*,¹⁵⁸ subsequent decisions of this Court make clear that *Sanders Bros.* cannot be taken to authorize the Commission to abdicate entirely to the marketplace its duty to regulate in the public interest.¹⁵⁹ And in discharging that duty the Commission may, as this Court has expressly noted, take into account licensees' program formats.

[In 1943] the Court considered the validity of the Commission's chain broadcasting regulations, which among other things forbade stations from devoting too much time to network programs in order that there be suitable opportunity for local programs serving local needs. The Court upheld the regulations, unequivocally recognizing that the Commission was more than a traffic policeman concerned with the technical aspects of broadcasting and that it neither exceeded its powers under the statute nor transgressed the First Amendment in interesting itself in *general program format* and the kinds of program broadcast by licensees. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

Red Lion, supra, 395 U.S. at 395 (emphasis added). As the Court there also observed, "[i]n applying [the public interest] standard the Commission for 40 years

¹⁵⁸506 F.2d at 267.

¹⁵⁹*NBC v. U.S.*, *supra*, 319 U.S. at 216-17; *RCA, supra*, 346 U.S. at 91.

has been choosing licensees based in part on their program proposals." *Id.* at 394.

The Commission's argument¹⁶⁰ that *WEFM* and *WNCN* would impose common carrier obligations on broadcasters and thereby violate § 3(h) of the Act¹⁶¹ and this Court's holdings in *CBS v. DNC* and *Midwest Video II* is difficult to understand. As this Court made clear in *Midwest Video II*,¹⁶² the hallmark of common-carrier status is the carrier's obligation to provide non-discriminatory public access to its facilities. The Court of Appeals took pains in *WNCN* to emphasize that:

Nothing remotely resembling public access obligations is involved in the present case. Nor do we find persuasive the other asserted resemblances between *WEFM* and common carrier regulation: it neither obligates broadcasters to "continue in service," regulates the rates charged to advertisers, or prohibits unnecessary duplication of facilities.

610 F.2d at 851-52 n. 36, FCC App. 26a. Under no circumstance would any non-licensee be afforded access to a broadcasting station by virtue of anything held, or even intimated, in the format cases or *WNCN*.

The Commission argues that to compel a broadcaster to "perpetuate a particular entertainment format as a condition to renewing or transferring its license would impose similar restraints [to common carriers' obligations to continue service] on radio broadcasters."¹⁶³ This misconstrues the format cases and *WNCN*, none of which even suggest that such a "condition" would, or could, be imposed.

¹⁶⁰FCC Br. 24-26. Petitioners *ABC et al.* make the same argument. ABC Br. 42-43.

¹⁶¹47 U.S.C. § 153(h).

¹⁶²*Midwest Video II, supra*, 440 U.S. at 700-05.

¹⁶³FCC Br. 25.

As the Court of Appeals stressed in *WNCN*, the Commission "cannot . . . force retention of an existing format."¹⁶⁴ Although a broadcaster might choose to refrain from making a format change which, because it would be contrary to the public interest, might create a risk of nonrenewal of his license,¹⁶⁵ this does not subject him to common carrier obligations any more than do his other duties as a public trustee.¹⁶⁶

Finally, the Commission suggests that the necessity of inquiring into a licensee's financial affairs and of making "conjectures about its profitability under hypothetical conditions . . . would convert the licensee into a common carrier . . ."¹⁶⁷ The decisive refutation of this argument is *Sanders Bros.* itself.

That case, which the Commission can hardly contend failed to appreciate the distinction between broadcasters and common carriers, would require precisely the sort of inquiry and "conjectures" that the Commission refers to whenever a licensee claimed that competition from a proposed new station would adversely affect service to the public. This is what the Court of Appeals held in *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958), where the argument now advanced by the Commission was rejected:

The Commission says that, if it has authority to consider economic injury as a factor in the public interest, the whole basic concept of a competitive broadcast industry disappears. We think it does not. Certainly the Supreme Court did not think so in the *Sanders Brothers* case, *supra*.

Id. at 443.

¹⁶⁴*WNCN, supra*, 610 F.2d at 851, FCC App. 25a 26a.

¹⁶⁵ See FCC Br. 25 n. 12.

¹⁶⁶The same risk would presumably induce him to abide by the fairness doctrine, see *Red Lion, supra*, and to broadcast news and informational programming. This is precisely what regulation of broadcasting in the public interest is supposed to accomplish.

¹⁶⁷ FCC Br. 45.

2) Agency Policy and Decisions

As previously discussed, since the enactment of the Radio Act of 1927, agency decisions and policy have regarded programming generally, and programming format in particular, as relevant and material to the public interest.¹⁶⁸ Accordingly, the Commission always has, and continues to weigh program format considerations in many of its licensing decisions.

At the very outset of federal radio regulation, the Federal Radio Commission recognized the importance of programming to the public interest.¹⁶⁹ When the FCC succeeded to the Radio Commission's duties following enactment of the present Act, it soon expressed similar views. Thus in its REPORT ON CHAIN BROADCASTING, issued in 1941 following an investigation of the radio networks, the FCC adopted numerous regulations governing network practices as they affected programming. Such regulations were viewed as necessary, and justified under the Act, so that licensees might give the public the best possible service.¹⁷⁰

Five years later, in 1946, the Commission, in its famous BLUE BOOK¹⁷¹ expressed in clear terms the close relationship between programming and the public interest. The BLUE BOOK went beyond the Commission's earlier concerns with duplication of programming and local control as opposed to network domination; it discussed in direct terms the obligation of broadcast licensees to serve the public's interest in receiving a diversity of program types, and stated that program format choices were central to the fulfillment of those obligations.

¹⁶⁸See discussion at pp. 9-10 *supra*.

¹⁶⁹See Federal Radio Commission, *Second Annual Report* (1928) quoted at note 53 *supra*.

¹⁷⁰See, e.g., REPORT ON CHAIN BROADCASTING 52, 57 (1941), as cited in *NBC v. U.S.*, *supra*, 319 U.S. at 199, which upheld the chain broadcasting regulations adopted there.

¹⁷¹See also note 15 *supra*.

It has long been an established policy of broadcasters themselves and of the Commission that the American system of broadcasting must serve significant minorities among our population, and the less dominant needs and tastes which most listeners have from time to time.

Id. at 15.

In 1960, the Commission returned once again to the subject of licensees' programming obligations. In its *Program Policy Statement (En Banc Programming Inquiry)* 44 F.C.C. 2303 (1960), the Commission emphasized the necessity of each broadcaster's programming serving the "tastes and needs" of his local community. *Id.* at 2312.

It is not only the Commission's policy expressions concerning programming generally which have emphasized its close relation to the public interest and the significance of choices of entertainment formats.¹⁷⁴ The Commission's policy toward comparative license proceedings has attached an even greater importance to applicants' and licensees' format choices.

Thus, as expressed in the Commission's 1965 *Policy Statement on Comparative Broadcast Hearings*, *supra*,¹⁷⁵ a proposal of a licensee or applicant to operate a format which would provide a "specialized" or unique service in its community was to receive "merit" towards "preference" as against its competitors in the licensing hearing held pursuant to *Ashbacker*. This rule has been modified since, but a successor version which still provides favorable treatment for unique formats remains in effect to this day. See *George E. Cameron Jr. Communications*, *supra*.¹⁷⁶ The rule giving special

¹⁷⁴See also, e.g., the 1971 *Primer on Ascertainment of Community Problems by Broadcast Applicants*, quoted at note 29 *supra*.

¹⁷⁵1 F.C.C. 2d 393, 397-98 (1965).

¹⁷⁶1 F.C.C. 2d 460 (1979).

merit to proposals for unique service since was approved and followed as recently as July 1980 in *Commercial Radio Institute, Inc.*, 47 RAD.REG. 2d (P&F) 1307 (Rev. Bd. 1980).

In addition to taking unique formats into account in comparative proceedings, the Commission also looks to those considerations in many proceedings involving frequency allocations.¹⁷⁵ The theme is the same in all of them: licensees who offer, or applicants who propose unique formats receive preferential treatment from the Commission, whether in the form of waivers of various Commission rules, or through receiving broader protection than would otherwise be afforded them.

It is impossible to square this pattern of active encouragement of program diversity with the Commission's professed inability -- both legal and practical -- to delve into such matters. The situation is simply one of discrimination against the listening public since it is only they, despite their standing under *UCC I* as parties in interest in Commission proceedings, who are unable to get the Commission to "look" at broadcasters' format choices.¹⁷⁶

3) Legislative History

The briefs of the petitioners argue, in various ways, that notwithstanding all the above authority which clearly supports *WNCN*, the legislative history of the Act somehow invalidates that decision and the other format cases.

The most extreme position is taken by *Insilco*, which views the legislative history as demonstrating

¹⁷⁵See, e.g., cases cited in note 22 *supra*.

¹⁷⁶See discussion at pp. 10-12 *supra*.

that Congress did not intend the Commission to engage in format regulation.¹⁷⁷

The Commission and CBS are somewhat more modest in their contentions that that history¹⁷⁸ shows Congress's intent to prohibit the Commission from

choos[ing] among various types of programming selected by licensees, and establish[ing] priorities as to subject matter.¹⁷⁹

The problem with the petitioners' legislative history arguments is that they are essentially irrelevant to the narrow issue presented in this case. Read carefully, all that the legislative history cited by all petitioners shows is that Congress did not intend an *allocations* scheme¹⁸⁰ based on program categories.

¹⁷⁷Insilco Br. 20-21. The use of the entirely overblown and inappropriate term "format regulation," like the other distortions discussed above, demonstrates the total irrelevance of Insilco's analysis of the issues actually presented in this case. No one -- not the Court of Appeals, or any of the respondents here -- believes that the Commission should engage in "format regulation." The public interest determination, in individual licensing proceedings, which is required by the statute is a far cry from Insilco's characterization.

¹⁷⁸The reviews of legislative history are contained in FCC Br. 27-30, ABC Br. 43-50, Insilco Br. 20-21 and will not be repeated here.

¹⁷⁹ABC Br. at 51. The Commission *discusses* the issue in these terms, but its point sub-heading, like Insilco's, speaks of format regulation. FCC Br. at 27.

¹⁸⁰At the time of passage of the Act, and in the years preceding, there were various legislative attempts to allocate broadcast facilities to various special uses -- educational, religious, agricultural, labor, cooperative -- first, under the so-called Hess bill, and later under the Wagner-Hatfield bill. None of these attempts at allocation was successful. Instead, the FCC was directed by Congress to hold hearings on the reserved channel concept and report back to Congress. The notion of reserved channels was clearly not renounced by Congress. All of the petitioners' briefs in this Court contain parts of the debate, but a full description of this history may be found in E. Barnouw, *THE GOLDEN WEB, A HISTORY OF BROADCASTING IN THE UNITED STATES, VOLUME II-1933 TO 1953*, at 22-28 (1968). See also *id.* at 293-95 for discussion of the Commission's action in reserving educational television channels without seeking additional legislative authority.

The format decisions, premised on individual public interest determinations in individual renewal or transfer situations, have nothing to do with allocations, as the D.C. Circuit has repeatedly told the Commission.¹⁸¹

To the extent that the Commission has historically read the legislative history of the Act not as to allocations, but as it relates to the Commission's authority to "consider program service of a licensee in passing on its application,"¹⁸² the Commission has never seen that history as barring what the format cases require.¹⁸³

The legislative history¹⁸⁴ thus poses no bar to the decision below which must, for all the reasons previously discussed, be affirmed.

POINT III

The Decision of the Court of Appeals Is Entirely Consistent with This Court's Explication of the First Amendment in the Broadcasting Context.

The very same decisions of this Court which define the Commission's duty under the Act to select and regulate licensees in the public interest, establish clearly that the First Amendment does not prohibit

¹⁸¹See discussion at pp. 24-25 *supra*.

¹⁸²BLUE BOOK, *supra*, at 11-12.

¹⁸³Clearly, as already discussed, the Commission could not have enacted the chain broadcasting rules nor could it have defended them in this Court if it had accepted the restrictive, but ultimately irrelevant view of the legislative history proposed by petitioners in this case.

¹⁸⁴One of the broadcast petitioners, ABC, argues that the legislative history of § 310(d) also "forecloses Commission regulation of format changes in the assignment transfer context." ABC Br. 49-50 n. 126. Aside from the fact that it is not regulation, but consideration of format changes which WNCN requires, it is significant to note that the Commission does not here, nor has it previously relied on this argument. In fact, its position has been to the contrary, see *Wichita-Hutchinson Co.*, 20 F.C.C.2d 584, 586 (1969). See WNCN, *supra*, 610 F.2d at 852 n. 37, FCC App. 26a-27a n. 37.

the Commission from basing its public interest determinations in part upon the program proposals of applicants and the past programming of licensees. The holdings of these cases are summarized in this Court's opinion in *Red Lion*, which is completely dispositive here.¹⁸⁵

We believe that *Red Lion*'s comprehensive, authoritative and definitive explication of the First Amendment's relation to the Act, and to the electronic media, encompasses and rebuts all the issues raised by petitioners. However, in an excess of caution, petitioners' various arguments will be addressed here within the constitutional framework provided by *Red Lion*.

The Constitutional Framework

Red Lion properly sets broadcasting apart from other media and firmly establishes that, as opposed to other channels of mass communication, the public's free speech interest in having access to diverse broadcast programming takes precedence over broadcasters' claims to unfettered programming discretion. *Id.*, 395 U.S. at 390. Under the First Amendment and the Act's public interest standard, broadcasters are obligated to serve the paramount public interest.¹⁸⁶ *Id.* at 390, 392. While *NBC v. U.S.* and *Pottsville* presaged this result, it was *Red Lion* that firmly established that broadcasters' speech rights are subordinate to the public interest in diversity.

This seemingly novel allocation of First Amendment rights is not inimical to traditional free speech concepts. Rather, the framework established in *Red Lion* promotes historical First Amendment values in a manner consistent with the unique physical characteristics of the electronic media.

¹⁸⁵ *Red Lion*, *supra*, 395 U.S. at 394-95.

¹⁸⁶ Correspondingly, it is the Commission's obligation to actively ensure that broadcasters meet that responsibility. *Id.* at 380, 395.

This Court's starting point in *Red Lion* was the simple, technological fact that free entry into the broadcasting marketplace is non-existent. Mr. Justice White reasoned that "it is idle to posit an unabridgeable First Amendment right to broadcast . . . [A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused." *Id.*, 395 U.S. at 388-89. See also *CBS v. DNC*, *supra*, 412 U.S. at 101; *NBC v. U.S.*, *supra*, 319 U.S. at 226.

This Court, consistent with the First Amendment's traditional concern for diversity, established that

[i]t is the [First Amendment] right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.

Red Lion, *supra*, 395 U.S. at 390.¹⁸⁷ It is, this Court reasoned, "the people as a whole [who] retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. . . ." *Id.* Licensees must thus program in a manner that meets the public's "paramount" First Amendment rights. The Commission

neither exceed[s] its power under the [Communications Act] nor transgress[es] the First Amendment in interesting itself in general program format and the kinds of programs broadcast by licensees.

¹⁸⁷ This all-inclusive panoply of concepts lays to rest any claim by the petitioners that entertainment programming is to be treated any differently than public affairs programming. We note that foreign language formats fall within several of the protected "ideas and experiences" thus most dramatically demonstrating the First Amendment interface between information and entertainment which *Red Lion* recognizes. See discussion at pp. 89-92 *infra*.

Id. at 395. This power is the heart of the Commission's licensing function. *Id.*

There is little doubt that such a constitutional framework is unique to broadcasting. However, that does not render the system suspect. The singular qualities of broadcasting, in conjunction with the primacy of the First Amendment's goal of diversity, compel the constitutional analysis adopted by this Court in *Red Lion* and sustain the result reached in the court below.

A. The Petitioners' Attempt to Impose a Least Drastic Means Test Would Require Overruling *Red Lion* and So May Not Prevail

Petitioners incorrectly argue that because the Court of Appeals merely stated that it found "no constitutional impediment" to its format decisions,¹⁸⁸ it failed to seriously examine the alleged "chilling effect" of the doctrine and their contention that programming diversity can be better achieved through the "less intrusive means" of reliance upon free competition in the marketplace and structural forms of regulation.¹⁸⁹

¹⁸⁸WNCN, *supra*, 610 F.2d at 855, FCC App. 33a.

¹⁸⁹It is conceded, however, that these First Amendment claims were fully briefed and argued below. ABC Br. 18 n. 45. The Court of Appeals, while perhaps terse, merely analyzed the petitioners' arguments from the perspective established in *Red Lion* and found those claims to be totally without merit. Petitioners are not entitled to a lengthy judicial explication on a point long disposed of.

In fact, however, since the basic constitutional framework of *Red Lion* clearly excludes such reliance, it is apparent that petitioners¹⁹⁰ are actually asking nothing less than that *Red Lion* be overruled. This is unwise, ill-timed,¹⁹¹ and, we believe, unconstitutional.

1) The Traditional "Less Drastic Means" Test for Constitutionality Is Inappropriate to the Physical Realities of Broadcasting and First Amendment Values Sought to Be Preserved and Furthered

Although petitioners would substitute the rationale of *Miami Herald* for that of *Red Lion*, none offers any explanations as to why the factual basis for *Red Lion*'s holding -- the physical¹⁹² and legal inhibitions to free entry into the broadcast industry -- have fallen

¹⁹⁰Insilco candidly challenges *Red Lion*'s rationale in light of this Court's subsequent, but entirely inapplicable decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) [*Miami Herald*]. Insilco Br. 35-37. ABC simply advocates the adoption of the traditional, non-broadcasting "less drastic means" analysis, ignoring the fact that it is totally at odds with the physical realities of broadcasting recognized in *Red Lion*. See ABC Br. 56-59. The Commission, perhaps constrained by its obligation to promote the First Amendment, raises this argument with somewhat less vigor. FCC Br. 57.

¹⁹¹The continued validity of *Red Lion* and the special First Amendment consideration it involves were recently reaffirmed in this Court's decision in *Consolidated Edison Co. of New York, Inc. v. Public Service Comm. of New York*, ____ U.S. ____, 100 S.Ct. 2326 (1980).

¹⁹²The physical properties of the electromagnetic spectrum have not mellowed with time, and it is still true that not everyone who may wish to broadcast is free to do so. Nor do the Commission's proposals to slightly expand the number of usable radio outlets, see FCC Br. 57 n. 42, alter those physical characteristics, nor seriously decrease spectrum scarcity. This fact is most graphically shown by the petitioners' favorite example, the marketplace. Within the last year, an AM station in New York, WHN, sold for \$14 million. So much for the end of scarcity.

into disrepute.¹⁹³ Rather, they merely argue that from a broadcaster's perspective, the public interest would be better served by allowing them free rein in a marketplace that does not allow for free entry.¹⁹⁴ This is precisely the theory rejected by this Court in *NBC v. U.S.*,¹⁹⁵ a rejection expanded upon in *Red Lion*, and reaffirmed in cases decided subsequent to *Miami Herald*.¹⁹⁶

¹⁹³The only support that Insilco appears able to muster for its argument is certain passages from B. Schmidt, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* 244 (1976). A careful reading of Schmidt's book reveals, however, that Insilco's citations actually cut against its claim. While Schmidt does note that the full "future" development of alternative electronic media -- e.g., cable television -- may someday partially overcome the arguable First Amendment shortcomings inherent in broadcasting's physical characteristics, as he acknowledges, these are mere hopes and expectancies. See e.g., B. Schmidt, *supra*, at 199-202. Moreover, one of Schmidt's brightest hopes for overcoming the physical and legal limitations on broadcasting recognized in *Red Lion* was cable access, which this Court subsequently struck down in *Midwest Video II*. B. Schmidt, *supra* at 205-216. Insilco's post-*Midwest Video II* reliance on Schmidt's hopes for the continued development of alternative schemes for diversifying the electronic media is misplaced.

¹⁹⁴Although the financial cost of entry into the print media may be high, unlike broadcasting there are no physical or legal obstacles preventing entry into the market. This is the constitutional basis for the distinction which permits limitations on broadcasters' absolute programming discretion in order to serve the "paramount" First Amendment rights of listeners.

¹⁹⁵In *NBC v. U.S.* this Court, using Justice Frankfurter's oft-quoted analogy, rejected the notion of the Commission's only role as a "traffic officer." See note 52 *supra*.

¹⁹⁶See e.g., *Buckley v. Valeo*, 424 U.S. 1, 49, n. 55 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 825, n. 10 (1975). Likewise, in *CBS v. DNC*, *supra*, 412 U.S. at 129, the Court dismissed cases such as *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), (upon which the petitioners here also rely) as "provid[ing] little guidance . . . in resolving the question . . . of the allocation of First Amendment rights in broadcasting.

If the "less drastic means" test had the applicability to broadcasting proposed by the petitioners, this Court in *NBC v. U.S.* would had to have reached the constitutionally mandated conclusion that any FCC intrusion beyond the "traffic officer" stage was impermissible, despite clear Congressional intent to the contrary. If the Commission were constitutionally restricted to policing the airwaves solely for interference, broadcasters would be left to the unfettered exercise of their free speech rights, while listeners' free speech rights would be left to the protection of "free competition" in the marketplace.¹⁹⁷ This is clearly a "less drastic means" of regulating broadcasting. It is exactly what the petitioners here advocate as being of constitutional necessity. It is also exactly what this Court rejected in *NBC v. U.S.*

This Court wrote:

[t]he "public interest" to be served under the Communications Act is . . . the interest of the listening public in "the larger and more effective use of radio." [47 U.S.C.] § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to public interest . . .

Id., 319 U.S. at 216. Had the Congress been constitutionally bound to adopt the least intrusive regulatory scheme that avoided chaos on the airwaves, *id.* at 210-213, this Court could not have reached the conclusion that the Communications Act "was a proper exercise of [Congress'] power over commerce" *Id.* at 227. See also *id.* at 217, 219; *Pottsville*, *supra*, 309 U.S. at 137.

¹⁹⁷As previously discussed marketplace competition does not always protect the First Amendment rights of minorities, those with minority tastes, and those who are, for reasons of demographics, less favored by advertisers, see, e.g., p. 21 and note 35 *supra*, a fact which the Commission concedes, see *Policy Statement*, 60 F.C.C.2d at 863, FCC App. 128a.

NBC v. U.S. emphasized the constitutional necessity of Congress having placed "upon the Commission the burden [through its licensing function] of determining the composition of [the] traffic [on the airwaves]." *Id.* at 216. The same rationale was utilized 26 years later in *Red Lion*. See *NBC v. U.S.*, *supra*, 319 U.S. at 226-227. This Court rejected the argument that only the least intrusive means of regulation are permissible in broadcasting. As Judge Learned Hand commented, speaking for the lower court in *NBC v. U.S.*:

The Commission does therefore coerce . . . [the licensees'] choice and their freedom; and perhaps, if the public interest in whose name this was done were other than the interest in free speech itself, we should have a problem under the First Amendment; we might have to say whether the interest protected, however vital, could stand against the constitutional right. But that is not the case. The interests which the regulations seek to protect are the very interests which the First Amendment itself protects . . ."

National Broadcasting Co. v. United States, 47 F.Supp. 940, 946 (S.D.N.Y. 1942), *aff'd*, 319 U.S. 190 (1943).

2) The "Less Drastic Means" of Insuring Diversity Proposed by Petitioners Are Neither Less Drastic Nor Responsive to the First Amendment Interests Here Under Consideration

Ironically, a number of the "less drastic means" of promoting diversity raised by the petitioners are in fact far more intrusive upon broadcasters' programming choices than even their most nightmarish versions of the format cases. Examples include the

Commission's AM-FM non-duplication rule,¹⁹⁸ which actually *prohibits* certain programming -- that duplicated on jointly-owned AM and FM stations in the same market, the chain broadcasting rules,¹⁹⁹ and the Prime Time Access Rule.²⁰⁰

Petitioners also note several structural regulations generally going to diversity of ownership which they argue are sufficient for insuring diversity.²⁰¹ These, however, are irrelevant to the concepts here under consideration. The format cases address questions of program diversity *regardless* of the identity of the licensee, just as was the case in *Red Lion*.

The two approaches to the general goal of media diversity are complementary, not fungible; they focus on entirely different aspects of the problem. In *NCCB* this Court agreed that diversity of ownership was not paramount, service was. *Id.*, 436 U.S. at 803-815. Thus those structural forms of regulation cited by the petitioners are not only not "less intrusive" than the format doctrine, they are not even related to the diversity goal here in issue.

Similarly, petitioners propose²⁰² prospective remedies like equal employment opportunity and

¹⁹⁸See e.g., ABC Br. 57-58. This is patently restrictive of broadcasters' programming discretion, yet the petitioners inexplicably tout the non-duplication rule as being less insidious than the format cases.

¹⁹⁹Those rules, upheld in *NBC v. U.S.*, restricted both broadcasters' and networks' freedom to, respectively, select and offer programming.

²⁰⁰That rule, also restricting licensees' ability to select program for showing at particular times, was upheld in *Mt. Mansfield Television, Inc. v. FCC*, 422 F.2d 470 (2d Cir. 1971). See also *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), where the Court upheld the Commission's restrictions upon cable television operators' freedom to retransmit television signals, and *Midwest Video I*, upholding a requirement that cablecasters originate some programming.

²⁰¹See FCC Br. 57 n. 42, ABC Br. 57-58, Insilco Br. 34-35.

²⁰²See, e.g., FCC Br. 57 n. 42.

minority ownership.²⁰³ These are complementary to, but far from fungible with the more limited, but separate impact of the format cases. Further, they are designed to bring about greater diversity in the future, not to prevent an actual loss of diversity in the present. This is the First Amendment interest safeguarded by WNCN and other format cases, to which the petitioners' suggestions are entirely unresponsive.

B. The Format Decisions Preserve and Protect All Listeners' Paramount Right to Diversity

In *UCC I* Chief Justice Burger observed that the alternative to Commission response to public participation and complaint in massive, day-to-day scrutiny of licensee performance by the Commission.²⁰⁴ Another alternative, of course, is a complete abandonment of any public interest consideration to the unfettered forces of marketplace competition.

The former poses an enormous threat to First Amendment freedoms of broadcasters and listeners alike.²⁰⁵ The latter would, as previously discussed, violate the clear statutory scheme and would also be constitutionally impermissible. See *CBS v. DNC*, *supra*, 412 U.S. at 123. As this Court stated in *Red Lion*, 390 U.S. at 392:

There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the

²⁰³ *Non Discrimination in Employment Practices*, 60 F.C.C.2d 226 (1976), and *Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 (1978), are designed to bring more racial and ethnic minorities into active participation in broadcasting, with the hope that this will make broadcasting more sensitive to the needs and tastes of minority groups.

²⁰⁴ See discussion at p. 11 *supra*.

²⁰⁵ It is not, however, as already discussed, in any way a potential result of the format decisions. See pp. 24-25 *supra*.

press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The WNCN decision and other format cases avoid both these problems and protect the general public's "paramount" First Amendment interest in diverse programming in a way entirely consistent with *UCC I*.

The abandonment of a unique,²⁰⁶ financially viable format results in a *per se* diminution of program diversity.²⁰⁷ The mechanism that triggers Commission inquiry is the "significant public grumbling" coming from the disenfranchised group of listeners, and although those who are grumbling may perceive that they have a very personal interest in the question, it is the public interest in diversity that they are actually vindicating.

Thus, contrary to the petitioners' claims,²⁰⁸ the format cases do not favor one particular group

²⁰⁶ It is, of course, only the abandonment of a *unique* format which implicates this *general* interest in diversity. If one of several, generally similar formats is to be deleted, although a significant group of listeners may indeed grumble over the prospect of losing their favorite disc-jockey or program-mix, that is not a protected public interest, because diversity is not threatened. Unless there is a realistic threat to diversity, Commission action is not mandated. See e.g., *James C. Sliger*, 70 F.C.C.2d 1565, 1597-99 (1977); Federal Radio Commission, *Second Annual Report* 166-68 (1928).

²⁰⁷ Whether that loss is *offset*, in terms of the public interest, by other factors such as the adoption of another unique format, is, of course, a proper area for Commission inquiry. *Red Lion*, *supra*, 395 U.S. at 395; *NBC v. U.S.*, *supra*, 319 U.S. at 215-16, 219, an inquiry which is clearly left open by the decision below.

²⁰⁸ See FCC Br. 54.

of listeners' programming preferences over another's.²⁰⁹ Nor do they subjugate any broadcaster's First Amendment rights to the whims of any segment of the audience.²¹⁰ The cases merely safeguard - where the marketplace threatens to fail - the First Amendment's preference for diversity over a broadcaster's preference for greater profits.

C. The Format Decisions Do Not Constitutionally Chill Licensee Programming Discretion

In balancing the public's First Amendment right of diversity of programming and the licensee's discretion to select program formats "it must constantly be kept in mind that the interest of the public is the foremost concern" *CBS v. DNC, supra*, 412 U.S. at 122. Thus, "a licensee must balance what it might prefer to do as a private entrepreneur with what it is required to do as a 'public trustee'." *Id.* at 118.

The petitioners argue that the mere possibility of a hearing as a result of a format change challenge will result in licensee self-censorship and deter innovative programming.²¹¹ As previously discussed,

²⁰⁹In the same way, the format cases do not allow one segment of the listening audience, whose collective desire for a non-unique format may be highly intense, to prevail over the possibly less intense preference of those who favor the retention of a unique format. The system only safeguards, to the greatest extent reasonably possible against a general reduction in diversity. *WEFM, supra*, 506 F.2d at 267.

²¹⁰In this regard, the petitioners' claims that the doctrine advances precisely the sort of governmental arbitration of taste proscribed in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), is clearly illusory. Under the format cases, the Commission's sole obligation is to actively insure that diversity of programming is maintained where economically and technically feasible. *WEFM, supra*, 506 F.2d at 267.

²¹¹See, e.g., FCC Br. 46-49, 55; ABC Br. 62-64.

the record contains not one iota of actual evidence supporting this contention and the court below was entirely correct in rejecting it. FCC Br. 46-49; ABC Br. 62-64.

The Commission's administrative experience similarly does not support petitioners' claim.²¹² The format cases presented to the Commission have been neither numerous nor burdensome.

A review of the format cases which have reached the Commission, commencing with *WCAB, Inc.*, 27 F.C.C.2d 743 (1971), indicates that most of these cases have been either settled or expeditiously disposed of on the basis of the initial pleadings.²¹³ Often, complaints about alleged format changes have been dispensed with through letter rulings with neither the necessity of a hearing nor even the rendering of an opinion on the merits.²¹⁴ The Court of Appeals correctly characterized the fears expressed here by petitioners, as somewhat less than realistic. *WNCN, supra*, 610 F.2d at 848, FCC App. 19a.

Since in ten years only one case involving an allegedly unique format has actually gone to hearing,

²¹²See discussion at p. 25 and note 60 *supra*.

²¹³See, e.g., *Riverside Broadcasting Co., Inc.*, 64 F.C.C.2d 866 (1977); *Stockholders of Rust*, 64 F.C.C.2d 883 (1977); *Thunderbird Broadcasting Co.*, 61 F.C.C.2d 1190 (1976); *Republic Broadcasting Corp.*, 57 F.C.C.2d 336 (1975); *Post-Newsweek Stations*, 57 F.C.C.2d 326 (1975); *Dick Broadcasting Co., Inc. of Tenn.*, 47 F.C.C.2d 1051 (1974); *Walter E. Webster, Jr.*, 43 F.C.C.2d 300 (1973); *Midwestern Broadcasting Co.*, 42 F.C.C.2d 1091 (1973); *Tri Cities Broadcasting Co.*, 42 F.C.C.2d 499 (1973); *Biola Schools & Colleges, Inc.*, 29 F.C.C.2d 787 (1971).

²¹⁴See, e.g., *National Broadcasting Co., Inc.*, 39 F.C.C.2d 400 (1973); *Koeth Broadcasting Co., Inc.*, 40 F.C.C.2d 534 (1973); *Rebel Broadcasting Co. and Tri-Cities Broadcasting Co.*, 40 F.C.C.2d 619 (1973); *William K. Alexander*, 41 F.C.C.2d 948 (1973); *Mid-South Broadcasting Corp.*, 44 F.C.C.2d 981 (1973); *Kaiser Broadcasting Corp.*, 45 F.C.C.2d 601 (1974); *Northern California Black Christian Group*, 45 F.C.C.2d 505 (1974).

petitioners are compelled to argue that because broadcasters are willing to settle cases, rather than undergo the hearing process, the format decisions have a chilling effect.²¹⁵ This is both inherently irrational, and directly contrary to the Commission's active encouragement of settlement of cases and emphasis on the importance of licensee-citizen dialogue and agreements. See e.g., *Agreements Between Broadcast Licensees and the Public*, 57 F.C.C.2d 42 (1975); *Newhouse Broadcasting Corp.*, 77 F.C.C.2d 97 (1980).

Actual settlements of cases which involve the potential abandonment of unique formats directly and dramatically demonstrate, better than virtually any argument, that the format decisions are correct in their protection of the First Amendment interest in diversity,²¹⁶ as well as statutorily compelled.

D. The Format Decisions Do Not Violate the Anti-Censorship Provisions of the Act

The Court of Appeals correctly rejected arguments that the format doctrine constitutes censorship prohibited by Section 326 of the Communications Act, 47 U.S.C. § 326. In *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726, 736

²¹⁵ See ABC Br 63.

²¹⁶ For example, as a result of settlements reached between listeners groups and broadcasters, New York City listeners may still tune to their only 24-hour classical music station (WNCN-FM) and their only jazz station (WRVR-FM). Seattle listeners continue to have a classical music station (KXA-AM). WYLO-AM listeners in Milwaukee have not seen a unique "polka" format displaced by yet a third paid religion format, and residents of the Bay Area still "swing" to an unduplicated "Big Band" format (KMPX-FM). All of these unique formats served minority groups who would have sorely felt their loss, all contributed and contribute to general diversity in their listening areas. All are making a profit for the licensees who program them; none would be on the air but for the format decisions and the public interest in diversity which they protect.

(1978), this Court traced the legislative history of Section 326, and definitively concluded that the "anti-censorship" provision of the Act, 47 U.S.C. § 326, does not "deny the Commission the power to review the content of completed broadcasts in the performance of its regulatory duties." *Id.* at 735-737.

Neither censorship, prior restraint nor the Commission's subjective programming preferences enters into the question.²¹⁷ The congressionally-mandated regulatory scheme of which the format decisions are only one example in no way results in a chilling effect on any licensee's speech rights. *CBS v. DNC*, *supra*, 412 U.S. at 110; *Red Lion*, *supra*, 395 U.S. at 390, 395; *NBC v. U.S.*, *supra*, 319 U.S. at 216, 219.

E. The Format Decisions Are Not Unconstitutionally Vague or Overbroad

The Commission argues that format analysis may be inherently vague and, on that supposition, suggests that it is unconstitutional.²¹⁸ To the extent that this argument is a recapitulation of its admin-

²¹⁷ The Commission has, in the past, never been troubled by imposing what might otherwise be characterized as prior restraints on licensees by approving or rejecting not merely general formats (unique or otherwise) but individual programs. See e.g., *Prime Time Access Rule*, 47 F.C.C.2d 769 (1973) (a waiver of the *Prime Time Access Rule* was granted to permit the broadcast of *National Geographic* programs, because they were of distinctive character); 43 F.C.C.2d 269 (1973) (approval for the same reason granted for the second time), *Prime Time Access Rule*, 43 F.C.C.2d 470 (1973) (the *Reasoner Report* warranted a waiver), *Prime Time Access Rule*, 45 F.C.C.2d 512 (1974) (*Animal World* warranted a waiver). See also *Henry v. FCC*, 302 F.2d 191 (D.C. Cir. 1962).

²¹⁸ FCC Br 55.

istrative nightmare argument,²¹⁹ these contentions must be rejected. Insofar as it represents an attempt to bring the case within the Court's vagueness or overbreadth analyses, petitioners' efforts must be similarly fail.²²⁰

Notably, petitioners do not argue that the format doctrine as delineated by the Court of Appeals is facially invalid. Rather, it is contended that there are no existing administrative standards which would address hypothetical instances of the application of the format doctrine that have First Amendment "ramifications."

This argument is suspect, in view of the Commission's ability to resolve format controversies in the past.²²¹ It is entirely disingenuous given the Commission's own adamant refusal to develop such standards notwithstanding the suggestions and comments of the Court of Appeals,²²² citizens groups and commentators alike,²²³ and it is ultimately untenable.

²¹⁹ The administrative nightmare argument included a variation on the vagueness theme, i.e., the contention that the Commission could not adequately distinguish among formats. Both contentions have been entirely discredited by the Commission's own actions. See discussion at pp. 37-38 *supra*.

²²⁰ As already discussed, there is absolutely no evidence that the format decisions have had any chilling effect on broadcasters, whether for vagueness or any other reason. Indeed, the evidence is to the contrary. Further, even if there were the possibility of a chilling effect, which there is not, this Court has noted that "the existence of a 'chilling' effect, even in the area of First Amendment rights, has never been considered a sufficient basis in and of itself, for prohibiting state action." *Younger v. Harris*, 401 U.S. 37, 51 (1971).

²²¹ See notes 212 and 214 *supra*.

²²² The Court of Appeals in *WNCN* was particularly deferential to the Commission's discretion and expertise in promulgating such rules and policies as might be necessary to implement the statutory mandate.

²²³ See discussion at pp. 40-41 *supra*.

F. The Concept of Universal Service Expressed in the First Amendment and The Communications Act Makes the Format Doctrine Especially Appropriate to Protect Against the Loss of Unique Foreign Language Formats

The Commission has repeatedly emphasized that our system of broadcast allocation is based upon the premise that in a democratic society all members of the public must have access to information and a means of self-expression.²²⁴ The specific intent of Congress that at least primary first broadcast service be provided to all the people of the United States is unequivocal.²²⁵

A key component of the Commission's public interest determination has always been the provision of service responsive to the diverse needs and interests of the community, in other words, universal service.²²⁶ This concept has particular importance in light of the shift from the well-balanced format to the specialized format that took place in the 1960's in response to advertisers' switch to television.²²⁷

Petitioners have attempted to belittle the importance of format diversity simply by classifying it as "entertainment." This ignores the realities of the medium, in addition to the mandate of *Red Lion*, *supra*, 395 U.S. 390. The line between informing and entertaining is too elusive for gross First Amendment distinctions.²²⁸

²²⁴ See e.g., *Sixth Report and Order*, 41 F.C.C. 148, 172 (1952). See also T. Emerson, *THE SYSTEM OF FREEDOM OF EXPRESSION* 653 (1970) [EMERSON].

²²⁵ See 47 U.S.C. §§ 151, 303(g), 307(b). See also *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (1955), and *Television Corporation of Michigan v. FCC*, 294 F.2d 730 (D.C. Cir. 1961).

²²⁶ See e.g., *NBC v. U.S.*, 319 U.S. 190, 215-218. See also *Great Lakes Statement*, Federal Radio Commission, *Third Annual Report* 32, 34 (1929).

²²⁷ See UCC, *et al.* Opp. to Cert. at 9-10.

²²⁸ *Winters v. New York*, 333 U.S. 507, 510 (1948).

This is particularly true in the context of formats oriented to ethnic, racial and cultural minorities.

The focus of the specialized music format, which in itself fosters and preserves cultural heritage and diversity, is transferred to the provision of "non-entertainment programming" such as specialized news, public affairs programming and information about political, social, educational and community services and events of particular interest and potential impact to those groups.²²⁹ Thus, the entertainment format may provide the only viable and effective broadcast vehicle for informational and public affairs programming available to such minority groups.

Where a particular entertainment format involves foreign language programming, loss of that format may constitute actual loss of effective and meaningful broadcast service to a significant segment of a community. This point is concretely illustrated by the provision of Spanish language programming.

While most Hispanic-Americans, who comprise at least five percent of the nation's population, are bilingual, many regard Spanish as their primary language and have difficulty using English.²³⁰ If a significant element of a community is unable to effectively receive communications other than by way of a foreign language format, the loss of that format clearly raises public interest questions of the greatest magnitude.²³¹

²²⁹See e.g., *UCC et al. Petition for Reconsideration*, JA313-316.

²³⁰See e.g., *U.C.C. et al. Opp. to Cert.* at 18.

²³¹Ironically, this obvious and critical public interest concern is acknowledged in the Commission's allocations policy, which generally requires affirmative action (i.e., waivers, etc.) to prospectively provide a first foreign language service to a community. See, e.g., *International Radio, Inc.*, *supra* and note 22 *supra*, at the same time that the *Policy Statement* prohibits even consideration of the issue where a unique foreign language format will be lost.

Under the Commission's view, as reflected in the *Policy Statement*²³² it is preferable to have 20 stations all talk about the same subject than one broadcasting in a unique foreign language, so long as there is marketplace consensus that most people are interested in the subject.²³³

This approach, which would exclude numerous critical sources of information and enlightenment for large numbers of demographically disfavored listeners, is simply impermissible under the public interest standard of the present Act.

Further, it is in direct violation not only of the public's First Amendment right to diversity of programming, but of all the most basic values underlying the First Amendment.²³⁴

²³²The Commission's view is, however, opposite where a licensee or potential licensee wants something from it, note 48 *supra*, than when it is citizens who protest a loss. This is yet another example, not merely of inconsistency, but of Commission hostility to representatives of the public and to the UCC decisions alike.

²³³The "people" are, of course, only those with high disposable incomes who are attractive to advertisers. See e.g., JA 80-81, 171.

²³⁴Three major purposes of the First Amendment's guarantee of freedom of speech have been identified. These are:

- 1) furtherance of an open "marketplace of ideas," -- see, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes and Brandeis dissenting); J. Milton, *Areopagitica, A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (1644);
- 2) furtherance of intelligent, self-government in a democratic system, see, e.g., Meiklejohn, *POLITICAL FREEDOM* (1960); Emerson, *supra* at 7; A. Bickel, *THE MORALITY OF CONSENT* 62-63 (1975); and
- 3) furtherance of the individual's ability of self-expression and thought, see, e.g., *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, J.J., concurring).

All are negatively affected by the loss of a unique foreign language format.

The *Policy Statement's* refusal to consider the public interest implications and First Amendment costs of the abandonment of a unique format, particularly one broadcasting in an otherwise unduplicated foreign language not only violates the statute, but is profoundly undemocratic,²⁴⁵ in its rejection of the obvious needs of our pluralistic society.

By abdicating all responsibilities to marketplace competition, statutorily required public interest determinations concerning the use of the public's airwaves are made only by those with market power, and no longer by those who have been appointed by and are responsible to the people's elected officials.

CONCLUSION

For all the above reasons, the decision of the Court of Appeals should be affirmed.

Dated: New York, New York

August 26, 1980

Respectfully submitted,

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The authors express their appreciation to Mark Conrad, Rita S. Eppler, Stuart Goldfarb, Michael S. Hassan, Michele Marqui and Madeline Nichols, *Student Interns*, and to Janel Radtke and Roberta Robbins, of the staff of New York Law School, for their invaluable aid in the preparation of this brief.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has abused its discretion in refusing to consider any circumstance of market failure in the provision of radio entertainment formats to a local community?

2. Whether an administrative agency must provide a safety valve for consideration of particularized circumstances which might negate the purposes of a rule or policy if the rule or policy were applied?

3. Whether the First Amendment or the Communications Act prohibit consideration of entertainment formats at the time of sale or renewal of license?

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Nos. 79-824, 79-825, 79-826, 79-827

In The

Supreme Court of the United States

October Term, 1979

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA.

Petitioners

v.

WNCN LISTENERS GUILD et al.

Respondents

On Writs of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICI CURIAE
CONSUMER FEDERATION OF AMERICA et al.

OPINIONS BELOW

JURISDICTION

STATUTES INVOLVED

Amici Adopt the Petitioners' statements
under these headings.

INTEREST OF THE PARTIES

AMICI CURIAE

Each of the amici curiae listed and described below is a citizen organization interested in seeing the largest and most effective use of the broadcast medium in the public's interest.

consistent with the First Amendment and the Communications Act. Specifically, each of these groups believes that the Federal Communications Commission has the responsibility to consider specific circumstances in the loss of unique entertainment formats, consistent with the Court of Appeals' en banc holding below. The amici also urge the Court not to allow the imposition of marketplace theory on circumstances where agency preconceptions run contrary to the facts.

Basically, the amici urge the Court to affirm the Court of Appeals' decision in full. We also urge both a narrow reading of the case below and a narrow decision on review, in view of the pendency of other actions at the FCC which might be affected by this case.

The amici are as follows:

CONSUMER FEDERATION OF AMERICA, headquartered in Washington, D.C., is a national coalition of over 240 nonprofit organizations, representative of over 30 million citizens, seeking here to represent the interests of consumers, viz., broadcast audiences around the country.

BOSTON COMMUNITY MEDIA COMMITTEE, COMMUNITY CAUCUS is the community arm of an organization, established in 1966, to combine broadcast industry and local community resources to encourage effective participation of minority audiences in Boston's mass media.

CLASSICAL MUSIC SUPPORTERS, headquartered in the Seattle, Washington market, includes 14,000 households in western Washington State, with approximately 2,500 households being regular dues-paying members. It seeks to further the interests of the listening audience with classical music as their first preference.

COMMITTEE FOR OPEN MEDIA is a citizens group headquartered in San Jose, California. It is a standing committee of the Santa Clara Valley Chapter of the ACLU and has as its objective the fullest and most democratic use of the broadcast media consistent with the First Amendment.

COMMUNICATIONS COMMISSION of the **NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.** is an agency of 32 Protestant and Orthodox Communion in the United States, which together have a total membership of about 42 million persons. Its member communions have charged the NCCC "to study and to speak and act on conditions and issues in the Nation and in the world which involve moral, ethical, and spiritual principles inherent in the Christian gospel." The Governing Board of the NCCC does not claim to speak for all the members of its churches, but they express the considered judgment and position of the representatives of those churches sitting for that purpose on the Governing Board. The Communications Commission is the arm of the NCCC officially charged with responsibility to speak out on matters relating to communications.

FRIENDS OF WONO is a citizens group in the Syracuse, New York market which has in the past pursued the interests of the listeners to classical music station WONO-FM in Syracuse.

GRAY PANTHER MEDIA WATCH is an arm of the **GRAY PANTHERS** organized six years ago for the purpose of monitoring the media to detect and eliminate patterns of discrimination against the elderly. **THE GRAY PANTHERS** is a national organization composed of Americans of all ages who are committed to raising our national consciousness about the way in which older persons are being treated in America today.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS is a trade union representing, for collective bargaining, men and women in the United States and Canada who are employed in the aerospace, aircraft, automotive, railroad, shipbuilding, machinery manufacturing and other industries. It is affiliated with the AFL-CIO and the Canadian Labour Congress.

KMPX LISTENERS GUILD is a citizens group in the San Francisco Bay Area which appeared before the FCC in a successful effort to retain a big band sound in the Bay Area. It continues to support a big band sound for the Bay Area.

LOUISIANA CENTER FOR THE PUBLIC INTEREST, located in New Orleans, Louisiana, is a public interest law firm engaged in the delivery of legal and social services to an elderly clientele in metropolitan New Orleans. It has engaged in systems advocacy on behalf of the aged, including advancement of the First Amendment rights of the elderly.

NATIONAL ASSOCIATION FOR BETTER BROADCASTING, founded in 1949, is the oldest national consumer organization in the United States with activities exclusively concerned with broadcast program service. Headquartered in Los Angeles, NABB is a nonprofit organization whose directors include active national leaders in law, education, business, religion, mental and physical health, journalism and social welfare.

NATIONAL COUNCIL OF SENIOR CITIZENS is an organization of more than 3.5 million senior citizens in 4,000 older people's clubs around the country. Its interests range from Federal and State legislation to community action, including support for an adequate income for the elderly, health care, housing, employment, social security, crime prevention and consumer affairs.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING is a broad-based national membership organization which has taken leadership roles on behalf of the public before the FCC over the past decade, seeking vindication of the public's rights in all forms of broadcasting and telecommunications media.

NATIONAL EDUCATION ASSOCIATION is the nation's oldest and largest organization of professional educators, with a membership of over 1.7 million. Its purposes as set forth in its charter, are "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States."

NATIONAL TASK FORCE ON PUBLIC BROADCASTING is a coalition of organizations and individuals throughout the country who combine a broad range of citizen concerns in telecommunications. The Task Force, headquartered in Oakland, California, is the only broadly based national organization dedicated to the establishment and protection of public rights in public telecommunications.

ORGANIZATIONS FOR UNIQUE RADIO is a national ad hoc coalition of organizations and individuals who seek the preservation of the public's rights in broadcasting with respect to the maintenance of unique, financially viable radio formats when strong public support exists for retention of a format.

PTA TELEVISION COMMISSION is a group of volunteers who operate the National Congress of Parents and Teachers' (PTA's) TV Action Center. The Center was established as a result of nationwide public hearings held by the PTA in 1977 which explored the influence of media on children and youth. It helps parents and teachers to

evaluate broadcasts, to use their influence to improve the quality of network and local broadcasts, and to design curricula aimed at improving students' viewing skills.

ARGUMENT

I. Introduction and Summary

This case presents troublesome issues of agency abuse and disavowal of discretion, industry favoritism, and violation of basic tenets of administrative law. The procedural posture is complicated by an agency's attempt to overrule the courts on its own, rather than to seek earlier review of unfavorable appellate decisions. It concerns an issue which arises in less than .01 of 1% of all FCC renewal and transfer cases, yet it could affect the most basic rights and interests of the public vis-a-vis their local broadcast stations.

The amici urge affirmance in all respects of the thoughtful en banc opinion below, which addresses the substantive legal merits of the Commission's policy, and which addresses the errant procedures contributing to the Commission's abuse of discretion committed in its determination of the policy. We seek here to highlight the most significant aspects of this case from the perspective of the listening audience.

In summary, we argue that the FCC misconstrues the relative First Amendment rights of broadcasters and the public. It fails to recognize the mismatch between a theoretically free market, on the one hand, and the governmentally limited radio market, with severely restricted entry, on the other. Furthermore, as the Court of Appeals below explained, advertising makes the audience the product being sold to advertisers, who are the "consumers." This skews the workings of the market as the sole determinant of viewer satisfaction.

The most egregious Commission mistake, legally, is its violation of the administrative law tenet that any rule must have escape valves, waivers and the like. The Commission's policy is never to look at market failures in the entertainment format question. Its absolute refusal to review particularized factual showings of market failure, such as the sale of the last viable Spanish language formatted station in a city 65% Hispanic, is simply illegal.

II. Procedural Posture

Amici attach significance to the fact that the Commission's orders below are an attempt by an administrative agency to circumvent or overrule a series of appellate court decisions without having sought review by this Court of any of those earlier decisions. Specifically, the FCC instituted its Inquiry (as opposed to a Rule Making proceeding) over one year after the Court of Appeals' en banc decision in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C.Cir. 1974) (en banc). The Commission was very apparent in its determination to avoid implementation of the court's statutory interpretation.¹ (See A.22a.)

This case is not and should not become a review of the *WEFM* decision ab initio. Once it became final, the *WEFM* holding became the proper and accepted statutory interpretation. The Commission's later attempt to change that interpretation must then be viewed in the same manner that any other change in agency interpretation of its statute is — with reasoned decision making and analysis, consistent with the statute and the Constitution.

¹ There are many instances when the courts are called upon to determine the correct statutory interpretation. Recently this Court reversed a series of FCC rules and policies as beyond the Commission's statutory authority. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). The Court's interpretation of the statute is ultimately that which the Commission must apply regardless of the agency's disagreement with the policy implications.

Thus, rather than to accept the Commission's characterization of appellate usurpation of an agency's policy-making function, we urge the Court to take cognizance of the FCC's posture of steadfast refusal to accept the judicial process or decisions. The Court would not condone such behavior of ordinary citizens, cf. *Walker v. Birmingham*, 388 U.S. 307, 318-19 (1967), and should view a government agency by an even stricter standard.

Nevertheless, the Commission does have the authority to change its policies and determinations of the public interest, if it rationally finds that the facts and circumstances so warrant. As we argue below, the Commission irrationally assumes a marketplace that never fails to achieve the public interest and refuses to look at specific facts and circumstances of particularized market failures in the future. Most egregiously, the Commission has again lost sight of its duty to balance conflicting First Amendment rights of the audience with those of the trustee licensed to serve that audience in radio, the broadcaster.

III. The Commission Erroneously Failed to Balance First Amendment Interests of the Public and of Broadcasters

A. *The Broadcaster's Speech Rights Must Be Balanced Against The Public's Right To Receive Speech.*

The Constitution protects the right to receive information and ideas in addition to and separate from the traditional right to speak. *Kleindienst v. Mandel*, 408 U.S. 753 (1972). "This freedom of speech and press . . . necessarily protects the right to receive . . ." *Martin v. City of Struthers*, 319 U.S. 131, 143 (1943). See also, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

In the context of the broadcast media, the public's right to receive is equally well-established. Justice White, writing for a unanimous Supreme Court in upholding the fairness doctrine in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), stated:

"It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . It is the right of the public to receive suitable access to social, political, aesthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC." (*Id.* at 390.)

Furthermore, in balancing this right against the competing rights of the licensee, the *Red Lion* Court held in oft quoted language, that "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.*

Inherent and integral to this right to receive speech is the public's interest in diversity of programming. See, e.g., *Red Lion*, *supra*; *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *WEFM*, *supra*. In accord with this important First Amendment right, the Court of Appeals in *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, 436 F.2d 263, 269 (D.C.Cir. 1970), found that the public's right to a diversity of programming formats is intrinsic to the "public interest" standard under which the FCC operates:

the 'public interest, convenience and necessity' can be served in the one case in a way that it cannot be in the other, since it is surely in the public interest, as that was conceived of by a Congress representative of all the people, for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources, whenever that is technically and economically feasible.

The First Amendment rights of the public derive from the basic action of the government, preventing distribution of an individual's ideas and thoughts over radio without either a government license or permission from a licensee who already has one and who exercises almost unfettered editorial discretion over what is aired. See *Red Lion*, *supra*; *CBS v. Democratic*

Nat'l Committee, 412 U.S. 94 (1973). The individual's right to speak over a broadcast frequency, then, yields to the general right of the public to receive information and entertainment from diverse sources.

In a continuum of First Amendment interests, it is possible to posit situations where the broadcaster's particular interest in free speech might prevail over the public's interest in a given regulation. Thus, while an unlimited right of access by individuals might enhance the public's interest in diversity and for individual self-expression, the Supreme Court in *CBS v. Democratic National Committee*, *supra*, held that no such First Amendment right existed over and above the broadcasters' journalistic interests, broadly accountable to the public.

Here, in contradistinction, however, the First Amendment interests of the public to receive diverse information and cultural sources is very strong in limited entertainment format situations, while broadcasters remain free to speak as they will on political, electorate-informing matters where their First Amendment interests in unfettered speech is greatest.² Yet the FCC has chosen to regulate in the political or controversial speech areas (e.g., Fairness Doctrine, ascertainment), while backing off from any consideration whatsoever of entertainment formats on First Amendment grounds.

Amici submit that the Commission's regulatory reluctance is misplaced, and that the public's First Amendment interest in cultural diversity must prevail over the broadcasters' interest in profit maximization.

² The Commission demonstrated no instances of a chilling effect on format changes or experimentation from the *WEFM* line of cases. To the contrary, over the past ten years since this doctrine has been in existence, the Commission's studies show a wide variety of diverse formats having developed.

B. The Free Market System Does Not Adequately Balance First Amendment Rights In Radio.

In its *Order* below (A.128a, para. 16) the Commission concludes that to promote the greatest diversity of listening choices for the public, "the marketplace is the best way to allocate entertainment formats in radio"

At the outset, the amici wish to emphasize their agreement, and the Court of Appeals' agreement, with this general proposition. ("We fully recognized [in *WEFM*] that market forces do generally provide diversification of formats." (A.24a.)) The point of difference is that the Commission is unwilling to look at the occasional particular situations where market forces break down. Yet it is predictable from the distinctions between the radio market and a theoretically perfect market that such market failures will occur.

In commercial radio the audience is the product, sold by the thousands to advertisers, who are the consumers. The economic incentives behind the free market system of broadcasting, then, are often inconsistent with both the principles of speech rights and the reality of diversity. The Court of Appeals recognized the import of these economic incentives to programming in *WEFM*, *supra*, 506 F.2d at 268:

There is, in the familiar sense, no free market in radio entertainment because over-the-air broadcasters do not deal directly with their listeners. They derive their revenue from the sale of advertising time. More time may be sold, and at higher rates, by a station that has a larger or a demographically more desirable audience for advertisers. Broadcasters therefore find it to their interest to appeal, through their entertainment format, to the particular audience that will enable them to maximize advertising revenues. If advertisers on the whole prefer to reach an audience of a certain type, e.g., young adults with their

larger discretionary incomes, then broadcasters, left entirely to themselves by the FCC, would shape their programming to the tastes of that segment of the public.

(See also the Court of Appeals decision at A.24.a)

The court thus concluded that, in view of these antidiversity incentives, a "policy of mechanistic deference to 'competition' in entertainment program format" by the FCC would not be in the public interest. *WEFM, supra*, 506 F.2d at 268.

If the FCC's role in maintaining a balance between competing interests is abdicated to the commercial marketplace, broadcasters will act in their own economic self-interest and will move to program formats which will enable them to maximize their advertising revenues. Concurrent with this drive to maximize profits will be an abandonment by broadcasters of those program formats which may appeal to those categories of listeners whom advertisers do not care to reach, such as the elderly or the economically disadvantaged. As a consequence, certain listeners who do not belong to a "demographically" desirable category will be deprived of their listening choice at the first preference level.

Compounding the profit maximization syndrome is the potential for abuse of the market allocation system in the transfer of licenses. For example, as noted in *WEFM, supra*, 506 F.2d at 260, Commissioner Cox "characterized the proposed sale and format change of WGKA in Atlanta as an effort not to cut losses, which he disputed, but to maximize profits and 'did not see how the requisite public interest finding could be made short of the illumination afforded by a hearing.'"

The *Citizens Committee (Atlanta)* case demonstrates a phenomenon analogous to "reverse-trafficking" of licenses which would result from the Commission's policy of deference. Since a station catering to a minority-taste is less profitable than a majority-taste station, a new broadcaster could enter a "popular" market more cheaply by purchasing a minority-taste

station and changing the format than by purchasing outright a popular-taste station. Furthermore, the original owner of the minority-taste station could sell its license at a higher price to a buyer intending to change the format, than to a buyer intending to continue the minority-taste format. Clearly, the incentives for both the purchaser and seller of a minority-taste station could well militate toward the conversion of the minority-format into a more profitable majority-format, all to the detriment of the former listeners.

This negative incentive is particularly ironic in that a major element of the sales price is the value of the government license, secured by monopoly rents and *free* to the "trustee" who is selected by the government to be able to use the frequency.³ Even the Commission itself regards licensing as a "subsidy for entertainment programming." *Deregulation of Radio*, (Notice) 44 Fed.Reg. 57636, 57655, n. 165 (1979).

Another problem with mechanistic reliance on the marketplace is that the government limits entry into a given market. This limitation is necessary to prevent interference, but the consequences are crucial here in distinguishing fact from the Commission's hypothetical pure market theory.

Under pure market theory, a free market would fairly allocate formats in large part because unmet demand for a format abandoned by a licensee could be satisfied by a new entrant. In radio markets new entry is often forbidden by the government's necessary limitations on licensing.

Thus in saturated markets, ones where all available frequencies are being used, the limits on entry could alter expectations that a "free market" will serve the public interest in each and every instance.

³ See H. Levin, *Fact and Fancy in Television Regulation* (1980) at pp. 102-10.

IV. The Commission Has Failed to Provide Safety Valve Procedures for Situations Where the Facts of a Particular Case Do Not Comport with the Underlying Purposes of a General Rule or Policy.

The greatest division between the Commission and the court is not with the 99% of all broadcasters who can select or alter their formats at will. Rather the question is whether the Commission can ignore specific instances of market failure, where theory succumbs to reality, and the basis for the rule does not hold. Judge Leventhal observed in *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C.Cir. 1969):

The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure. . . . That an agency may discharge its responsibilities by promulgating rules of general application . . . does not relieve it of its obligation to seek out the "public interest" in particular individualized cases.

Similarly in *United States v. Storer Broadcasting Corp.*, 351 U.S. 192, 205 (1953), this Court held that the Commission was required to consider waivers of a rule on multiple ownership where it could be shown that nonapplicability would serve the underlying purposes of the general rule or policy. See also *NBC v. United States*, 319 U.S. 190, 207, 225 (1943).

Certainly the Commission could have come to grips with the problem and designed criteria by which licensees and the public would be able to measure market failure. But the Commission's further effrontery to the above principles in its *Order* below (A.134a, n.8)⁴ requires judicial reversal.

⁴"The Commission has indicated that it would take an extra hard look at the reasonableness of any proposal that would deprive a community of its only source of a particular type of programming. *Zenith Radio Corporation*, 40 FCC 2d at 231. Having given the entire matter further study, however, we have concluded that such a position is neither administratively tenable nor necessary in the public interest.

(Footnote continued on next page)

V. Format Change Cases are Rare and Manageable.

Protests of format changes are necessarily rare. It is very costly and unwieldy to mount a campaign to gain thousands of petition signatures of protest, establish uniqueness of format and show viability of the format. In the ten year history of the format change doctrine we have been able to identify fewer than 20 reported cases of challenges to format changes before the FCC.⁵ See list of cases in the Addendum to this brief. In all but a handful the Commission has disposed of the issue without a hearing. Two cases were affirmed by the Court of Appeals, *Hartford Communications Committee v. FCC*, 467 F.2d 408 (D.C.Cir. 1972) and *Lakewood Broadcasting Service v. FCC*, 478 F.2d 919 (D.C.Cir. 1973). Two were remanded to the Commission but settled prior to hearing. *Citizens Committee (Atlanta) v. FCC*, 436 F.2d 263 (D.C. Cir. 1970), and *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973). Only *WEEF*, *supra*, resulted in a hearing, and as the Court of Appeals observed, that was settled prior to administrative review. While a few other protests have occurred, they have been so minor that the FCC has disposed of them in the form of unreported opinions. The extent of the administrative problem, then, is minimal, and likely to remain so.

Recently, the Commission dismissed a challenge to transfer of Georgetown University's WGTB-FM to the University of the District of Columbia. While it conceded uniqueness of the format and a significant public outcry, the Commission found

(Footnote continued from previous page)

Rather, as discussed herein, we believe that the market is the allocation mechanism of preference for entertainment formats, and that Commission supervision in this area will not be conducive either to producing program diversity nor satisfied radio listeners." (A.134a)

⁵We estimate that during that period the Commission considered at least 26,000 renewals and 5,000 transfers. Thus, format change issues arose in less than half of 1% of all transfers taken alone and less than .01 of 1% of all Commission renewal and transfer cases.

without a hearing that other public interest factors warranted approval of the transfer. The Commission concluded that the transfer would result in an increase in educational/instructional programming, and that at the most it was "a tradeoff of one mix of arguably unique musical programming for another mix of arguably unique musical programming." *Georgetown University*, 77 F.C.C.2d 7, 17 (1980).

This case demonstrates the Commission's ability to face the issue when required to do so under *WEFM*, and to resolve the questions in a reasonably clear and efficient manner.

VI. A Resolution of this Case Should Remain as Narrow as the Court of Appeals'.

While the issue in the instant case is not a particularly common one, its resolution by this Court could have a significant bearing on the public's future rights in broadcasting. If the Court paints with a broad brush, for example, we could see the heretofore delicate balance of First Amendment rights seriously upset.

Most of the amici have been actively trying to participate in the Commission's ongoing proceeding designed to eliminate some other substantive rules and policies for radio. *Deregulation of Radio, supra*. We urge the Court not to write an opinion in this proceeding which would adversely affect the rights of the public with respect to non-entertainment programming. With the limitations on an individual's right to speak over radio, and the public subsidies provided to broadcast licensees, we as citizens pay a heavy price for the public trusteeship trade-off. Occasionally the FCC must step in to assure that the trade-off is working according to congressionally delegated standards. The Court of Appeals did no more than necessary to prod the Commission into acting as Congress had provided. We urge this Court to act in a similarly restrained way.

CONCLUSION

For the foregoing reasons, Amici Consumer Federation of America et al. respectfully urge this Court to affirm in full the court's decision below.*

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August 29, 1980

* The authors wish to gratefully acknowledge research assistance for this brief from Ms. Jeeni Wong, UCLA Law student, and Andrew Feshbach, undergraduate, UC Berkeley, and administrative support from Doris W. Davis. This brief does not necessarily reflect the views or position of the University of California, or any other state agency.

ADDENDUM**Reported Cases Involving Significant Protests
To Changes In Entertainment Formats, 1970-1980**

1. Citizens Committee to Preserve the Voice of the Arts in Atlanta (WFKA-FM) v. FCC, 436 F.2d (D.C.Cir. 1970) (court reversal of FCC summary approval of sale of classical station to transferee proposing a middle of the road (MOR) station. Settled on remand. No hearing.)
2. WCAB, Inc., 27 F.C.C.2d 743 (1971) (approval of sale of market's second progressive rock station, which was losing money, over objections of 34 listeners. No hearing.)
3. Keyes Corp., 31 F.C.C.2d 32 (1971). (No hearing required on protest from competing station.)
4. Leflore Broadcasting Co., 36 F.C.C.2d 101 (1972) (change of format occasioned look at licensee's other activities; hearing held on issues apart from format change question and license ultimately denied, 65 F.C.C.2d 556 (1977), *aff'd*, 47 P&F Radio Reg 2d 901 (D.C.Cir. 1980)).
5. Rebel Broadcasting Co., 40 F.C.C.2d 619 (1973) (change from MOR to rhythm and blues; approved without a hearing over protest from competing station with Black format; area 40% Black population.)
6. Hartford Communications Comm. v. FCC, 467 F.2d 408 (D.C.Cir. 1972) (sale of UHF pay channel to religious broadcaster did not warrant a hearing.)
7. Citizens Committee to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C.Cir. 1973) (remanded for a hearing on the issues of financial viability of the existing "progressive rock" format and alternative sources of the format; the parties settled the dispute and no hearing was held.)

8. *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C.Cir. 1973) (affirmed the Commission's approval of switch from "all news" to "country and western," without a hearing.)
9. *Station WWQS-FM*, 27 P&F Radio Reg.2d 667 (1974). (format change from religious music to "standard popular" music, where the licensee owned an AM station with a religious format, approved without hearing.)
10. *Kaiser Broadcasting Corp.*, 45 F.C.C.2d 601 (1974)(assignment from "mixture of rock, rock/folk, folk and popular vocal" to religious talk and music approved without a hearing where substantial financial loss shown on the present format, and the format was available on other stations in the service area.)
11. *Starr WNCN, Inc.*, 48 F.C.C.2d 1221 (1974)(petition to stay the mid-term format change from classical to quadraphonic rock was denied over 100,000 concerned listeners' objections to the proposed change. Ultimately settled without a hearing.)
12. *Citizens Committee to Save WEFM v. F.C.C.*, 506 F.2d 246 (D.C.Cir. 1974) (en banc) (court remanded switch from classical to rock music for a hearing on the questions of financial viability, accuracy of community leader surveys, and availability of alternative sources.) Subsequently, the parties agreed to a settlement during the administrative process and the Commission approved. *Zenith Radio Corp.*, 42 P&F Radio Reg.2d 472 (1978).
13. *Leonard J. Patricelli*, 40 P&F Radio Reg.2d 924 (1977)(change from classical to popular music, approved without a hearing over a petition to stay.)
14. *Stockholders of Rust Communications Group, Inc.*, 64 F.C.C.2d 883 (1977)(format change from "all news" to "country & western" approved without a hearing over a petition to deny filed by a competitive station with "country & western" format.)

15. *McCormick Communications, Inc.*, 42 P&F Radio Reg.2d 989 (1978)(proposed format change from contemporary to "mixture of religious, instructional, talk, and inspirational" approved without a hearing over petition to deny submitted by one individual.)
16. *WEZE, INC.*, 44 P&F Radio Reg.2d 966 (1978)(second petition to deny was filed against transfer in *McCormick Communications, Inc.*, *supra*; disposed of without a hearing.)
17. *Plough Broadcasting Co., Inc.*, 44 P&F Radio Reg.2d 1465 (1978). (assignment approved without a hearing over objections raised in 13 letters and a petition signed by 97 individuals from a "country & western" format to a "beautiful music" format. The Commission noted that the letters and the petition did not meet the requisite showing of significant public protest, and emphasized that the loss in diversity potentially occasioned by format changes that deprive an area of its only stations employing a particular format does not override the public interest in having decisions affecting program content made by private rather than government interests.)
18. *Georgetown University*, 77 F.C.C.2d 7 (1980)(transfer approved without hearing where new format was unique.)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

Nos. 79-824, 79-825, 79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
v. *Petitioners*,

WNCN LISTENERS GUILD, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit

JOINT REPLY BRIEF FOR PETITIONERS
AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC., METROMEDIA, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS,
NATIONAL BROADCASTING COMPANY, INC.,
NATIONAL RADIO BROADCASTERS ASSOCIATION,
WBNS TV INC. AND RADIOHIO INCORPORATED

The Joint Brief for Respondents largely ignores many of the central issues of this case. It devotes scant attention to the extensive and significant legislative history of the Communications Act bearing on these issues, and to the articulation of the policies of the Act in this Court's decisions in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) [hereinafter *CBS v. DNC*], *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [hereinafter *FCC v. NCCB*] and *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) [hereinafter *Midwest Video*]. Respondents' attempts to minimize the intrusive nature and significance of the standard imposed by the court below

and to suggest that its decision can somehow be affirmed on an alternative procedural ground are without merit.¹

I. RESPONDENTS HAVE NOT DEMONSTRATED THAT THE COMMUNICATIONS ACT REQUIRES THE COMMISSION TO ENGAGE IN FORMAT REGULATION.

Respondents attempt to characterize the court of appeals' format rulings as "narrow and limited,"² and contend that they merely require the Federal Communications Commission (the "Commission") to hold hearings and "consider" changes from unique formats.³ However, hearings and consideration are required by the court below solely because of the court's underlying determination that the Commission must, under appropriate circumstances, bar particular format changes. As we demonstrated in our opening brief, the format cases thus require the Commission to engage in extensive and intrusive broadcast program regulation, and to reject proposed format changes which do not satisfy the standards imposed by the court of appeals.⁴

To suggest, as respondents do,⁵ that this degree of Commission oversight somehow does not involve "regula-

¹ The opinion of the court of appeals, *WNCN Listeners Guild v. FCC*, is reported at 610 F.2d 838; the opinions of the Federal Communications Commission, *Changes in the Entertainment Format of Broadcast Stations*, are reported at 60 F.C.C.2d 858 (1976) and 66 F.C.C.2d 78 (1977). References to the Joint Appendix in the court of appeals will be cited herein as "C.A.J.A. —." References to the Appendix to the Government's petition for writ of certiorari will be cited herein as "FCC App. —." References to the Joint Appendix in this Court will be cited herein as "Jt. App. —."

² Joint Brief for Respondents *WNCN Listeners Guild et al.* (*WNCN et al. Brief*) at 39.

³ *Id.* at 19 n.38, 63. See also *id.* at 1, 35.

⁴ See Joint Brief for Petitioners American Broadcasting Companies, Inc. *et al.* (*ABC et al. Brief*) at 27-28, 56-57.

⁵ See *WNCN et al. Brief* at 72 n.177.

tion" of radio program formats is specious. Nor is it plausible to argue that regulation is not involved because the only sanction for impermissibly altering a format during the license term is denial of a license renewal, i.e., the termination of the enterprise.⁶ No exercise in semantics can conceal the fact that the court of appeals required the Commission, in effect, to dictate a licensee's program schedule by forcing it to retain a format where the broadcaster has concluded, on the basis of its own programming judgment, that a new or altered format would better serve the audience. There is nothing either "narrow" or "limited" about this requirement.⁷ Nor is this requirement supportable under the Communications Act.

A. The Commission, and Not the Court of Appeals, Has Primary Responsibility for Determining the Public Interest.

Remarkably, respondents contend that no deference need be accorded by the court of appeals to the Commission's view of what is required by the "public interest" standard⁸ of the Communications Act.⁹ None of the cases cited by respondents involved a construction of the public interest standard under the Communications Act or under any other statute.¹⁰ Indeed, as we discussed in

⁶ *Id.* See also *id.* at 58. Of course, where a change of format is proposed in an assignment application, the sanction is denial of the proposed assignment.

⁷ Respondents have failed to suggest how the court of appeals' format rulings can be confined to the license renewal and assignment contexts. We demonstrated in our opening brief that the logic of the format decisions might lead the court to compel the Commission to engage in even more intrusive program content regulation. See *ABC et al. Brief* at 28.

⁸ See 47 U.S.C. §§ 307(d), 309(a), 310(d). See *ABC et al. Brief* at 26.

⁹ *WNCN et al. Brief* at 32.

¹⁰ Respondents place extensive and rather puzzling reliance on two irrelevant cases. See *id.* at 10-12, 32-33, 54, citing *Ashbacker*

our opening brief, the legislative history of the Communications Act makes clear that the Commission, and not the court of appeals, is charged with initially defining what is encompassed by the public interest standard.¹¹ Respondents do not even advert to this important legislative history, nor are they apparently willing to accept the decisions of this Court which have made equally clear that Congress delegated to the Commission authority for the "weighing of policies under the 'public interest' standard."¹²

B. The Commission Is Not Required To Adopt Every Regulation Which Might Arguably Promote Program Diversity.

Respondents further claim that the decision below is "nothing more than a straightforward implementation of the regulatory scheme which Congress adopted in the Radio Act of 1927 and later the Communications Act of

Radio Corp. v. FCC, 326 U.S. 327 (1945), and *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) [hereinafter *UCC*]. These cases held that listeners have standing to seek denial of a license renewal where the licensee has failed to comply with Commission rules and point out that licenses may not be issued without comparative hearings if relevant issues of fact are contested and there are competing applications. But these propositions are not in issue here. Unlike the court of appeals' decision here, in neither *UCC* nor *Ashbacker* did the reviewing court dictate the substantive standards the Commission was to apply in making its public interest determination, and this Court in *Ashbacker* emphasized that it was "not concerned . . . with the merits. This [case] involves only a matter of procedure." 326 U.S. at 333 (footnote omitted).

¹¹ See *ABC et al. Brief* at 29-32.

¹² *FCC v. NCCB*, 436 U.S. at 810. See also *National Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943). See also *Brief for the Federal Communications Commission, et al. (FCC Brief)*, at 33-34.

1934."¹³ The respondents apparently find a precision in the public interest standard which has heretofore escaped notice by this Court, the Commission and commentators in the field.¹⁴ Their theory evidently is that since program "diversity" is in the public interest, Commission regulation of radio program formats to promote such diversity is necessarily required.¹⁵

In administering the Communications Act, the Commission confronts a variety of possible regulatory alternatives. The Act clearly does not require that the Commission elect to engage in every type of program regulation that could conceivably advance diversity or that might be consistent with the First Amendment, just as it does not require the Commission to adopt every ownership regulation that might be viewed as promoting diversity. This Court in *FCC v. NCCB* found nothing "in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to 'presume' that its diversification policy should be given controlling weight in all circumstances."¹⁶

As we pointed out in our opening brief,¹⁷ the policies of the Communications Act and the First Amendment strongly confirm the Commission's decision to refrain from regulating radio formats. While particular respondents or amici may regard formats which emphasize symphonic music, opera, or jazz as being more in the

¹³ *WNCN et al. Brief* at 29.

¹⁴ See, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); *Inquiry and Proposed Rule Making: Deregulation of Radio*, 73 F.C.C.2d 457, 479-81 (1979); D. CILLMOR & J. BARRON, *MASS COMMUNICATIONS LAW* 764 (3d ed. 1979).

¹⁵ See, e.g., *WNCN et al. Brief* at 57-58.

¹⁶ 436 U.S. at 810 (footnote omitted). See *ABC et al. Brief* at 40.

¹⁷ *ABC et al. Brief* at 41-50, 54-72.

public interest than other formats, it is not the Commission's function to select from among the available types of programming on the basis of subjective judgments as to whether a particular format better serves the public interest than some other format.¹⁸ The suggestion in the opposing briefs that the Commission concern itself with such matters reflects a fundamental misapprehension of the Commission's role under the Communications Act, a serious misreading of the history of the Act, and an apparent ignorance of the role which the Commission and its predecessor, the Federal Radio Commission, have played since 1927.

The view of respondents and amici is that Commission selection of "diverse" formats is necessary in order to confine the role of "private broadcasters" in the selection of programming.¹⁹ Respondents' belittling of the role of broadcast licensees, however, is entirely inconsistent with the statutory scheme which makes clear that broadcasters are to enjoy wide latitude in the choice of programming.²⁰ In *CBS v. DNC*, this Court confirmed that in

¹⁸ See *id.* at 41-50, 54-59.

¹⁹ See *WNCN et al.* Brief at 62. Respondents also claim that advertisers unduly influence the selection of radio programming and that it is necessary for the Commission to insure the broadcast of programming which is not advertiser supported. See *id.* at 62, 79 n.197, 91 n.233. Whatever the merits of that concern, it hardly justifies Commission dictation of program formats. The belief that there was a need for non-advertiser supported programming was the very consideration that led to government funding of public broadcasting. See 47 U.S.C. §§ 390-394; H.R. REP. NO. 1178, 95th Cong., 2d Sess. 4 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 5345, 5348; H.R. REP. NO. 572, 90th Cong., 1st Sess. 3 (1967), reprinted in [1967] U.S. CODE CONG. & AD. NEWS 1772, 1801. As a result, various cultural tastes—including those favoring classical music—are served by public radio as well as by commercial stations.

²⁰ See *ABC et al.* Brief at 41-43. See also FCC Brief at 20-27.

enacting the 1927 Radio Act, "Congress appears to have concluded . . . that of [the] two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." 412 U.S. at 105. That principle was recently reaffirmed by this Court in *Midwest Video*, 440 U.S. at 705: "the policy of the Act [is] to preserve editorial control of programming in the licensee."

Moreover, as shown in our opening brief, the legislative history of the Act indicates that Congress specifically rejected proposals to authorize the Commission, in licensing individual stations, to prescribe the broadcaster's choice among alternative program subject matters.²¹ Respondents devote little attention to this significant legislative history, arguing that it is "essentially irrelevant to the narrow issue presented in this case."²² In essence, they attempt to distinguish the regulation rejected in the 1920's from format regulation by suggesting that "all that the legislative history cited by all petitioners shows is that Congress did not intend an *allocations* scheme based on program categories."²³

Respondents' view is unsupportable. Congress was not merely concerned that the Commission might allocate channels to particular subject matters, but was apprehensive that the Commission, in choosing among competing applicants, would establish priorities based upon the subject matter of the applicants' proposed programming. The legislative history is replete with statements of con-

²¹ *ABC et al.* Brief at 43-50.

²² *WNCN et al.* Brief at 72.

²³ *Id.* (footnote omitted; emphasis in original). "Allocation" is a term apparently used by respondents to denote the reservation of a particular channel for a particular service (e.g., FM radio or VHF television) as opposed to the process of granting to individual applicants licenses to use specific frequencies.

cern about such comparative consideration.²⁴ Specific statutory language which would have empowered the Commission to "prescribe . . . the priorities as to subject matter to be observed by . . . each station within any class . . ." was ultimately rejected.²⁵ Thus, the view that the Commission should "prescribe" the broadcaster's choice of program subject matter "in determining who shall and who shall not receive licenses and renewals" did not prevail.²⁶ This is precisely the type of regulation which the court of appeals here has ordered the Commission to undertake.

Respondents' suggestion that the Commission, in considering license applications, has in the past considered proposed entertainment program formats is also inaccurate.²⁷ In performing its licensing function, the Com-

²⁴ Thus, during the 1926 Congressional hearings on radio regulation, the question was raised whether "the fact they are going to broadcast sacred music—does that have any more effect on getting a license than the fact that you are going to broadcast jazz?" *Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37 (1926). And at an earlier conference, Congressman Wallace White, later the author of the bill that was the basis for the Radio Act, questioned whether the government, in assigning licenses, should "give a priority" to one type of programming over another, i.e., to religious sermons over prize fight reports, to crop reports over baseball reports, or to sermons over sacred concerts. Minutes of Open Meeting of Dep't of Commerce Conference of Radio Telephony, Feb. 27-28, 1922, at 95-96.

²⁵ H.R. 7357, 68th Cong., 1st Sess. § 1(B) (1924). See 66 CONG. REC. 2361 (1925); 68 CONG. REC. 2572 (1927).

²⁶ *Hearings on H.R. 5589* at 39-40.

²⁷ See *WNCN et al.* Brief at 9-10, 69-71. Respondents make the surprising suggestion that:

"Clearly, as already discussed, the Commission could not have enacted the chain broadcasting rules nor could it have defended them in this Court if it had accepted the restric-

mission historically has given limited consideration to the overall proposed programming of an applicant for an initial license and to the past programming of an applicant for license renewal. In addition to considering compliance with such requirements as the equal opportunities provisions of Section 315²⁸ and the fairness doctrine,²⁹ the Commission has given limited consideration to the overall amounts of news and public affairs programming³⁰ and to the quantity of local and live programming.³¹ The Commission has primarily reviewed the

tive, but ultimately irrelevant view of the legislative history proposed by petitioners in this case." *Id.* at 73 n.183.

Nothing in the chain broadcasting regulations assigns priorities to programs based on their subject matters. See 47 C.F.R. § 73.658 (a)-(h) (1979). Indeed, those rules sought to promote the free choice of programming by local stations. That goal would be undermined by the regulatory regime advocated by respondents.

²⁸ 47 U.S.C. § 315(a). See *Western Connecticut Broadcasting Co.*, 43 F.C.C.2d 730 (1973).

²⁹ See, e.g., *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), reconsideration denied, 27 F.C.C.2d 565 (1971), *aff'd sub nom. Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), cert. denied, 412 U.S. 922 (1973).

³⁰ See, e.g., 47 C.F.R. § 0.281(a) (8) (1979); *AM & FM Program Form*, 1 F.C.C.2d 439 (1965).

³¹ See, e.g., 47 C.F.R. § 0.281(a) (8) (1979); *En Banc Programming Report*, 44 F.C.C. 2303, 2314 (1960). In the *Report on Public Service Responsibility of Broadcast Licensees* (1946) (the "Blue Book"), cited by respondents, *WNCN et al.* Brief at 7 n.15, 69, the Commission merely decided to consider the quantity of locally produced, live, public affairs and non-commercial programming presented by broadcasters. It neither dictated the subject matter of the programming nor required adherence to a particular format.

Amici American Symphony Orchestra *et al.* point to the Commission's "meritorious" programming policy for license renewals as demonstrating that program formats have been considered relevant to the Commission's public interest determination. Brief Amicus Curiae of American Symphony Orchestra *et al.* at 16-17. The Commission's policy in this area is merely to consider in miti-

licensee's responsiveness to the problems, needs, and interests of the community as ascertained by the broadcaster on the basis of its own community surveys.³²

However, the decisions of the court of appeals requiring format regulation go much further and represent a radical departure from traditional standards. As the Commission observed, "[f]or over 40 years . . . broadcast applicants have been free to select their own programming formats."³³ For the Commission to play a more active

gation of alleged rule violations some of the same types of programming as are deemed relevant to comparative judgments between two competing applicants. But the Commission has not deemed a licensee's choice of a particular format to be relevant in this context.

Moreover, the Commission recently confirmed that its "long-standing [meritorious programming] policy has been to give primary consideration to public service programming . . ." and not to entertainment programming. *Cosmopolitan Broadcasting Corp.*, 75 F.C.C.2d 423, 425 (1980). The Commission, in that case, rejected a meritorious programming claim because the applicant had failed to demonstrate that its entertainment programming contained sufficient "public service 'elements.'" *Id.* at 428.

³² See *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).

³³ *Notice of Inquiry: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580, 585 (1975), FCC App. 60a, 72a.

Respondents cite Commission consideration of specialized services in comparative proceedings as evidence that the Commission has routinely granted licenses on the basis of entertainment formats. They also refer to Commission consideration of these program services in determining whether the nighttime allocation rule (47 C.F.R. § 73.37(e)(2) (1979)) should be waived to permit the nighttime operation of a station. *WNCN et al.* Brief at 9, 70-71. Thus, respondents assert that "since the enactment of the Radio Act of 1927, agency decisions and policy have regarded . . . programming format . . . as relevant and material to the public interest." *Id.* at 69.

In fact, none of the cases relied on by respondents involved entertainment formats. Rather, they concerned proposals to broadcast in foreign languages (e.g., *International Radio, Inc.*, 45 P&F

and intrusive role in the selection of programming would be contrary to the Communications Act and, as we now demonstrate, would also be contrary to the First Amendment.

Rad. Reg.2d 173 (1979); *D&E Broadcasting Co.*, 70 F.C.C.2d 646 (1978)), to present programming directed to a minority segment of the community, such as Blacks (e.g., *Salter Broadcasting Co.*, 8 F.C.C.2d 1036 (1967); *Flint Family Radio, Inc.*, 69 F.C.C.2d 38 (Rev. Bd. 1977); *George E. Cameron Jr. Communications*, 71 F.C.C.2d 460 (1979)), or to broadcast predominantly religious programming (*Ward L. Jones*, 32 Fed. Reg. 1062 (1967); *Flint Family Radio, Inc.*, *supra*).

The Commission and its Review Board have recently indicated that, even for these specialized program services, comparative preferences will rarely be warranted. *Flint Family Radio, Inc.*, *supra*; *George E. Cameron Jr. Communications*, *supra*. In *Flint Family Radio*, a member of the Commission's Review Board, while urging that minority and religious programming should result in a comparative preference, observed that:

"I know of no comparative case involving initial licensing and requiring a determination of relative need for specialized programming, where the entertainment or musical programming proposed by any of the applicants has been considered relevant to an ultimate determination of whether a need for the proposed service exists. . . ." 69 F.C.C.2d at 52 (concurring statement of Member Kessler).

The Commission's policy statement under review, while briefly mentioning foreign language programming, *see* 60 F.C.C.2d at 863, FCC App. 128a; 66 F.C.C.2d at 80, FCC App. 181a, did not specifically address these and other specialized program service categories. A foreign language program service, of course, presents issues very different from those involved here since the decisions the Commission is required to make, if permissible at all, do not involve judgments as to the desirability of particular program subject matters but focus instead on the language of the broadcast. The Commission's policies with respect to specialized religious and ethnic program services are still in the process of evolution. Therefore, this Court need not now decide whether the Commission can or should regulate proposed changes in this area or whether the Commission can or should grant preferences for such specialized programming services.

II. RESPONDENTS HAVE FAILED TO RECOGNIZE THE SUBSTANTIAL FIRST AMENDMENT CONSIDERATIONS THAT STRONGLY SUPPORT THE COMMISSION'S POLICY JUDGMENT.

By emphasizing general principles that are not in serious dispute in this case, respondents have failed to come to grips with the substantial constitutional concerns that guided the Commission in reaching its policy determination. Respondents' approach is exemplified by their introductory assertion that *Red Lion*³⁴ so definitively disposes of the First Amendment issues that any elaboration is almost superfluous, volunteered by respondents only out of "an excess of caution."³⁵ It is also illustrated by respondents' highlighting of the "less drastic means" test while either avoiding or minimizing the more basic thrust of our First Amendment argument.³⁶

While it may suit respondents' purpose to suggest that petitioners are here effectively requesting that *Red Lion* be overruled, this case presents no such issue and does not require resolution of the Commission's authority with respect to the unique constitutional status of broadcasting. We have shown that the Commission's policy judgment in this case was strongly supported by First Amendment principles specifically applicable to broadcasting.³⁷

Despite respondents' suggestions,³⁸ *Red Lion* is not dispositive here, nor does it grant the Commission un-

³⁴ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

³⁵ *WNCN et al. Brief* at 74.

³⁶ While the "less drastic means" test lends further support to the Commission's findings in this case, it plainly did not constitute the major emphasis of our First Amendment argument.

³⁷ See *ABC et al. Brief* at 54-57.

³⁸ *WNCN et al. Brief* at 74.

fettered discretion to dictate programming. In fact, the Commission's fairness doctrine, upheld in *Red Lion*, was deemed constitutionally acceptable only because it "contemplates a wide range of licensee discretion." See *Midwest Video*, 440 U.S. at 705 n.14.

The differences between Commission administration of the fairness doctrine and direct regulation of program formats are pronounced. As previously noted,³⁹ the fairness doctrine requires that when broadcasters present one side of a controversial issue of public importance, they must also present opposing viewpoints. In this respect, the fairness doctrine does not dictate a broadcaster's initial choice of programming, restrain the broadcast of speech or control the manner of presentation.⁴⁰ Indeed, the Court cautioned in *Red Lion* that government "refusal to permit [a] broadcaster to carry a particular program . . . would raise serious First Amendment issues." 395 U.S. at 396. In contrast, the type of regulation required by the decision below would institute a dramatic new level of intrusiveness, forcing the Commission, in certain circumstances, to dictate a licensee's basic program schedule—*e.g.*, requiring continued adherence to a "classical," "middle-of-the-road," "country and western" or "all-talk" program format—in circumstances where the broadcaster has affirmatively exercised a contrary editorial and artistic judgment.

In essence, the First Amendment arguments of respondents fail to join issue adequately with the findings of the Commission and the arguments of petitioners in this Court. For example, they have not even directly ad-

³⁹ *ABC et al. Brief* at 56.

⁴⁰ In *Red Lion*, the Court noted that the fairness doctrine requires "that discussion of public issues be presented on broadcast stations." 395 U.S. at 369. But the Court also made clear that the selection of particular programs is for the broadcaster. *Id.* at 396.

dressed the Commission's conclusion that program format regulation would necessarily require application of highly subjective and elusive standards—which is a major source of the constitutional difficulties the Commission envisioned.⁴¹ Similarly, respondents merely gloss over the Commission's finding that format regulation would have an adverse chilling effect on the programming judgments of broadcast licensees. Respondents simply assert that no specific evidence of chilling has been documented.⁴² Yet they appear to recognize the obvious: "a broadcaster might choose to refrain from making a format change" because such a change "might create a risk of nonrenewal of his license."⁴³

⁴¹ See *ABC et al.* Brief at 64-70. As we emphasized in our opening brief, the fact that program formats are composed of highly subjective elements makes it virtually impossible to categorize those formats without intruding impermissibly into matters of taste and editorial judgment. See *id.*

⁴² *WNCN et al.* Brief at 88 n.220. Respondents' apparent reliance in this context on *Younger v. Harris*, 401 U.S. 37 (1971), is misplaced. In *Younger*, this Court cited established principles of federalism in overturning a federal district court injunction that had halted, without a proper showing of irreparable injury, an ongoing state criminal prosecution. The *Younger* court merely observed that any chilling effect occasioned by a state criminal statute would not automatically render that law unconstitutional if it could be shown that the "effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." *Id.* at 51 (citations omitted). Respondents have made no attempt to demonstrate that this *Younger* test is applicable to the facts of this case or that it is satisfied here. On the contrary, as we have shown, the effect on speech in this case is by no means minor (*ABC et al.* Brief at 62); the Commission has correctly determined that attempts to "control" broadcasters' program format "conduct" involve grave and unwarranted risks (*id.* at 40-41); and the Commission does not lack alternative means for enhancing program diversity (*id.* at 57-58).

⁴³ *WNCN et al.* Brief at 68 (footnote omitted).

In our opening brief we discussed some of the more evident manifestations of the chilling effect.⁴⁴ It is additionally worth noting, however, that the influence of format regulation on individual licensee decisionmaking may reverberate throughout the industry in ways that are not always obvious and direct. See, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397, 407 (D.C. Cir. 1975) (separate statement of Chief Judge Bazelon). In this general context, respondents' conclusory statement that the numerous pre-hearing settlements of format cases "directly and dramatically demonstrate" the alleged "correctness" of the format decisions is nothing more than an attempt to obscure the essential significance of these settlements—i.e., that they provide compelling evidence that broadcasters are in fact deterred from experimenting with programming concepts by the high cost, delay and uncertainty of Commission proceedings (whether formal or informal, and whether threatened or actual).

In sum, it is difficult to imagine an approach more inimical to the First Amendment and more inconsistent with the governing statutory scheme than a requirement depriving broadcasters of the right to select their basic program format and forcing the Commission to reach subjective judgments, editorial in nature, as to the desirability of particular programs or program formats.

III. THE ALLEGED PROCEDURAL ERROR DOES NOT PROVIDE AN INDEPENDENT GROUND FOR AFFIRMING THE COURT OF APPEALS' DECISION.

Respondents claim that the Commission's alleged improper reliance on a staff study⁴⁵ constitutes an addi-

⁴⁴ *ABC et al.* Brief at 62-64. See also FCC Brief at 52-56.

⁴⁵ *WNCN et al.* Brief at 86.

⁴⁶ Respondents consistently refer to this study as "two" studies. The study is reflected in Tables 1, 2 and 3 of the Commission's initial decision. See 60 F.C.C.2d at 875-81, FCC App. 164a-70a.

tional basis for affirming the decision below.⁴⁷ The court of appeals' decision did not rest on this ground, but on the theory that the public interest standard requires regulation of program formats as a matter of law.⁴⁸

It is equally clear that the issues in this case transcend the proceeding under review. The court of appeals' requirement that the Commission engage in format regulation was the result of sharply divergent views of the Commission's role in defining the public interest standard under the Communications Act, a difference that has been reflected in court of appeals' decisions over the past decade.⁴⁹ The alleged errors in the Commission's proceeding would not provide an independent ground for affirming the court of appeals' interpretation of the Act. Neither would additional Commission proceedings further illuminate the fundamental issue of this case—whether the Commission was required by the public interest standard to regulate changes in radio program formats. The court of appeals evidently agreed.⁵⁰

⁴⁷ Respondents also argue that the Commission's decision was "arbitrary and capricious." *WNCN et al.* Brief at 33-43. As we have shown in our opening brief, this contention is without merit. See *ABC et al.* Brief at 36.

⁴⁸ The court of appeals explicitly stated that it was not relying on the alleged procedural error as a ground for reversing the Commission. 610 F.2d at 847 n.24, FCC App. 17a.

⁴⁹ In addition to the decision below, see *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974); *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970).

⁵⁰ As noted in Judge Tamm's dissenting opinion below, the existence of an error in the Commission's proceeding would have warranted, at most, a remand to the Commission to rectify the error. 610 F.2d at 864, FCC App. 54a (Tamm, J., dissenting). See also *South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805-06 (1976); *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 9-10 (1974).

Moreover, the Commission did not place improper reliance on the staff study which considered the audience ratings and formats of radio stations in the twenty-five largest metropolitan markets. The study consisted of a statistical compilation of format and ratings data derived primarily from two widely available sources.⁵¹ The purpose of the compilation was to determine the extent of format diversity in those markets and to test the Commission's hypothesis that audience satisfaction is not necessarily correlated to format diversity.⁵² The study confirmed the Commission's theory and the argument in other parties' submissions⁵³ that further proliferation of formats would not necessarily increase overall listener satisfaction.⁵⁴ The Commission characterized the study only as "bearing out" or "lending further credence" to conclusions which it had reached on the basis of its own long experience, and itself observed that these studies provide "only a rough indication of format diversity in the 25 largest markets."⁵⁵

The results of the staff study—along with a discussion of the data and the methodology employed—were pub-

⁵¹ BROADCASTING YEARBOOK 1975 and ARBITRON RADIO USA, Spring 1975.

⁵² The latter was tested by performing a regression analysis on the relationship between stations' audience shares and their program formats. 60 F.C.C.2d at 874, FCC App. 161a. The statistical compilation in Table 3, *id.* at 881, FCC App. 170a, demonstrated that "audience ratings for major market radio stations tend to differ nearly as much for stations programming similar types of music . . . as they do for stations programming markedly different types . . ." *Id.* at 863, FCC App. 129a.

⁵³ See, e.g., Owen, "Radio Station Format Changes, Diversity, and Consumer Welfare," submitted as Appendix 1 to the Comments of National Association of Broadcasters, *Jt. App.* 23.

⁵⁴ 60 F.C.C.2d at 864, FCC App. 130a.

⁵⁵ 60 F.C.C.2d at 863, 874, FCC App. 129a, 160a; 66 F.C.C.2d at 85, FCC App. 190a.

lished on July 30, 1976 as Appendix B to the Commission's initial policy statement. Respondents argue that the Commission could not lawfully rely on the study because it, along with the raw data, were not disclosed before the Commission's initial decision.⁵⁶ In essence, respondents claim that they were entitled to discover, to test, and to rebut the accuracy of all material on which the Commission relied. These are the hallmarks of adversarial proceedings, but not of informal rulemaking.

Contrary to respondents' contentions,⁵⁷ there is nothing in the Administrative Procedure Act that requires agencies to employ adversarial procedures in rulemakings. Section 553 of the Act, which governs the procedure for informal rulemakings, provides for general public notice of the proceeding and for an opportunity to comment.⁵⁸ But Section 553 neither mandates a formal hearing nor entitles parties "to submit rebuttal evidence" as do the provisions prescribing procedures for agency adjudications.⁵⁹

Indeed, respondents' procedural argument appears to ignore this Court's recent holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), that Section 553 provides only limited procedural rights and that courts are not

⁵⁶ After Citizens Communication Center's FOIA request on August 30, 1976 for the raw data supporting the study, those data were publicly disclosed by the Commission with a more detailed explanation of the staff's methodology. C.A.J.A. 74-87. A so-called computer key identifying the stations was released after reconsideration had been denied. *Id.* at 573-75.

⁵⁷ WNCN *et al.* Brief at 50-52.

⁵⁸ 5 U.S.C. § 553(b), (c). See also *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523-24 (1978).

⁵⁹ See 5 U.S.C. §§ 554, 556(d).

free to impose additional procedural requirements.⁶⁰ There is no requirement in rulemaking that the Commission compile a complete factual record supporting its decision or that it invite rebuttal on every fact which supports its decision. Recently, in *FCC v. NCCB*, this Court recognized that "complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'"⁶¹

Moreover, respondents did have an adequate opportunity to challenge and rebut the Commission's staff study. All criticisms levelled in their brief at the staff's methodology and at the Commission's failure to disclose that methodology could have been made in petitions for reconsideration on the basis of the Commission's description of the study in the *Policy Statement*.⁶² Yet none of

⁶⁰ It is significant that respondents, in urging that Section 553 embodies a requirement of full disclosure, rely heavily on cases from the District of Columbia Circuit that predate *Vermont Yankee*. WNCN *et al.* Brief at 50-51, citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238 (D.C. Cir. 1973); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973).

Interestingly, the Commission here even complied with an earlier District of Columbia Circuit case which recognized that an agency may disclose the information on which it relies "in the final decision so that reconsideration may be sought and judicial review meaningfully afforded." *United States Line, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 535 (D.C. Cir. 1978) (construing Section 553 of the Administrative Procedure Act and a statutory "hearing" requirement).

⁶¹ *FCC v. NCCB*, 436 U.S. at 814, quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961).

⁶² The alleged errors do not appear to be substantial; respondents claim that the staff study was flawed because it was limited to the top twenty-five markets, did not include information for all stations,

the petitions for reconsideration on behalf of respondents or anyone else mentioned these alleged deficiencies in the staff's study. Having failed to raise their objections before the Commission, respondents may not raise them on review.⁶³

In sum, the fundamental issues of this case are whether the Commission is required to regulate radio program formats and whether such regulation is consistent with the policies of the Communications Act and the First Amendment. Respondents' contention that the court of appeals' format requirements can be sustained on the basis of alleged deficiencies in the Commission's proceeding is without merit.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the decision of the court of appeals should be reversed.

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and failed to disclose the mathematical formula employed. WNCN *et al.* Brief at 49 n.111. Respondents have alleged no other errors in the staff study.

⁶³ See 47 U.S.C. § 405.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-824

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-825

INSILCO BROADCASTING CORPORATION, ET AL.,
PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-826

AMERICAN BROADCASTING COMPANIES, INC., ET AL.,
PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

No. 79-827

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL.,
PETITIONERS

v.

WNCN LISTENERS GUILD, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT*

**REPLY BRIEF FOR THE FEDERAL
COMMUNICATIONS COMMISSION AND THE
UNITED STATES OF AMERICA**

1. Respondents fail to come to grips with our central contention that nothing in the Communications Act of

1934 compels the Commission to review entertainment format changes whenever listeners "grumble" about the loss of an allegedly unique format. The general "public interest" standard that the Commission applies when considering license transfers and renewals does not mandate this kind of governmental intrusion. And respondents refer to no other statutory standard that does.

The Commission has concluded that the public interest in diversity in entertainment programming will best be served by reliance on competition among broadcasters rather than on government regulation. The Commission's judgment as to the best method of furthering the public interest in this respect is entitled to judicial deference, particularly when the Commission is required to accommodate "diversity" and other values inherent in the public interest standard. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803-814 (1978).¹

At bottom, respondents' assertion that the public interest demands proliferation of allegedly "unique" entertainment formats rests on nothing but their own subjective preference,² is wholly wanting in support from

¹ Respondents argue (Br. 32) that this Court should not defer to the agency's interpretation of the public interest standard because reviewing courts are the "final arbiters of statutory construction." This Court's decisions, however, announce a different rule. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *CBS v. Democratic National Committee*, 412 U.S. 94, 102-103 (1973).

² Respondents argue (Br. 83 n. 206) that there is little public interest value in diversity within formats, and suggest (Br. 84 n. 209) that even strong or widespread preferences of persons who desire diversity within format categories should count less than preferences of others who desire retention of "unique" formats. These arguments confirm Judge Tamm's observation (Pet. App. 54a) that the "format doctrine" "mandates regulation favoring the interests of fewer listeners over the interests of more listeners."

the Commission's prior precedents,³ and conflicts with the intent of Congress as expressed in the legislative history.⁴

³ Except in recent years when required to do so by the D.C. Circuit, the Commission never has required renewal or transfer applicants to justify abandonment of allegedly unique entertainment formats. See Pet. App. 72a. See also *En Banc Programming Inquiry*, 44 F.C.C. 2303, 2308-2309 (1960) (the choice of entertainment programming rests with the broadcaster). The Commission has required licensees to ascertain information needs in their service areas, but licensees need not conduct a survey of entertainment tastes. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C. 2d 418, 429, 442, 445 (1976); *Leflore Broadcasting Co., Inc.*, 36 F.C.C. 2d 101, 103 (1972). Thus, while it is true that, in comparative licensing proceedings, the Commission may give weight to the community's need for specialized foreign language or ethnic non-entertainment programming (*George E. Cameron Communications*, 71 F.C.C. 2d 460, 465-466 (1979)), the Commission has never considered the entertainment elements of proposed programming to be relevant in a comparative hearing (see *Flinn Family Radio, Inc.*, 69 F.C.C. 2d 38, 52 (Rev. Bd. 1977) ~~Kessler~~, (dissenting opinion)), or otherwise attempted to oversee entertainment formats.

⁴ As demonstrated in our opening brief (Br. 27-30), the legislative history shows that Congress did not intend to require regulation of entertainment formats. Respondents argue that this history is irrelevant (Br. 72-73 n. 180), contending that it has no bearing on governmental review of entertainment formats in license renewal proceedings. However, the legislative history shows that Congress considered and rejected the concept of entertainment format regulation in individual licensing proceedings. For instance, in hearings leading to passage of the Radio Act of 1927, Rep. Reid asked "[i]s the fact that they are going to broadcast sacred music—does that have any more effect on getting a license than the fact that you are going to broadcast jazz?" *Radio Communication: Hearings on H.R. 5589 Before the House Comm. on Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37 (1926). He was told that under existing Department of Commerce regulation, no such preference was given. *Ibid.* Rep. Davis and others asked whether it would be a good idea in licensing cases to displace "jazz" with "high-class music," to use the "public interest" rationale "to afford a better and more wholesome set of programs," or to establish a "right of way" for "church music" on Sunday mornings. *Id.* at 38-40. Rep. White, the bill's sponsor, reminded them that language in an earlier bill (H.R. 7357, 68th Cong., 1st Sess., Section 1(B) (1924)) would have required

In an attempt to minimize the intrusive nature of the court of appeals' format doctrine, respondents also maintain (Br. 19 nn. 38, 39, 72 n. 177, 73 n. 184) that the doctrine is "narrow and limited" and merely requires the Commission to "consider" or "look at" format changes, rather than to "regulate" them. But the court of appeals clearly requires more than passive observation on the part of the agency. The Commission must hold a costly and time-consuming hearing, and then render a public interest determination on the licensee's application. If the Commission finds that a format change is not in the public interest, it must then (absent countervailing factors) deny the license renewal or transfer request, or condition a grant in favor of the licensee on retention of the "unique" format. See, e.g., *Citizens Committee to Save WEFM v. FCC*, 506 F. 2d 246, 268 (D.C. Cir. 1974). Surely, this is "regulation."

The Commission has, of course, acknowledged that market allocation is not always "perfect" (Pet. App. 128a).⁵ But no system for selecting entertainment

the Commission to "fix priorities as to subject matter" but had not been included in the new bill because "it involved censorship." *Id.* at 39-40. Evidently agreeing that the Commission should not be required to give preferences to particular entertainment formats, Congress chose not to reinsert the "priorities as to subject matter" language in the Radio Act or later in the Communications Act. See our initial brief at 28-29.

⁵ Respondents appear to endorse the court of appeals' view that there is a "failure" of the market whenever a "unique" format is abandoned and "public grumbling" is forthcoming. In this view, competition is an appropriate policy only until the marketplace produces a result that the "grumblers" do not like. But there is no way that the Commission can step in when grumbling commences and determine whether preservation of an endangered format is in the public interest. The very possibility of agency intervention in these circumstances will chill experimentation necessary to produce arguably "unique" formats in the first place (Pet. App. 183a, 185a).

programming will ever be "perfect" in meeting the diverse and rapidly changing tastes of listeners. Moreover, regulation has its own substantial flaws, including the inherent elusiveness of format classification and the impossibility of ascertaining the breadth, intensity, and relative importance of entertainment tastes in concrete cases. In view of its inability to serve as an arbiter of public taste in entertainment programming, the Commission reasonably found that the radio marketplace, despite its imperfections, is "the best available means of producing the diversity to which the public is entitled." Pet. App. 128a.⁶

2. Respondents' First Amendment assertions are also wide of the mark. We recognize that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390. As this Court has emphasized, however, the broadcasting system depends on "private broadcast journalism, held only broadly accountable to public interest standards." *CBS v. Democratic National Committee*, *supra*, 412 U.S. at 120. For this reason, broadcasters are entitled to exercise "the widest journalistic freedom consistent with their public obligations." *Id.* at 110.

⁶ Respondents also argue (Br. 62) that broadcasters, influenced by advertisers, tend to "neglect the interests of all but the most demographically desirable consumers." However, this argument exaggerates the influence of audience "demographics" and ignores the "relevant and important question . . . whether programming reasonably corresponds to audience preference" (Pet. App. 87a). The Commission found no evidence that the entertainment tastes of the less demographically desirable consumers have been "ignored" by broadcasters (Pet. App. 182a). Gaps in the marketplace, which may temporarily result from shifts in formats, are quickly filled in a dynamic competitive environment. Pet. App. 68a.

Applying these principles, the Commission properly balanced the public's rights with those of broadcasters. The Commission concluded that the public interest in diversity in entertainment programming could best be served by reliance on competition rather than regulation. See Pet. App. 124a-133a. Thus, the Commission's approach better serves the needs of the listening public than the court of appeals' format doctrine, and does so at a lesser cost to broadcasters' legitimate First Amendment interests. It is the court of appeals' format doctrine, not the Commission's Policy Statement, which threatens substantial and unnecessary injury to First Amendment values.⁷

Respondents misconceive our analysis of the "least restrictive alternatives" doctrine. We agree that the government is not required to adopt the least restrictive method of statutory administration in all instances. The requirement is only that any intrusion into fundamental liberties "be viewed in the light of less drastic means for achieving the same basic purposes." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (emphasis supplied). Plainly, the Commission need not adopt a less restrictive policy if that would not suffice to achieve an important statutory

⁷Contrary to respondents' claim (Br. 89), the Commission's approach poses no threat to the First Amendment rights of non-English speaking listeners. The Commission's Policy Statement deals only with entertainment programming. See note 3, *supra*. Radio broadcasters continue to have the obligation to ascertain the informational needs and particular problems of persons in their service areas, including non-English speaking listeners. See *Ascertainment of Community Problems*, *supra*, 57 F.C.C. 2d at 442, 444. Thus, there is no basis whatever for respondents' assertion (Br. 90) that entertainment formats provide "the only viable and effective broadcast vehicle for informational and public affairs programming available to such minority groups." See *Marsh Media*, 67 F.C.C. 2d 284, 291-292 (1977) (Chairman Ferris, concurring). See also note 8, *infra*.

objective. But where, as here, the less restrictive alternative is best adapted to achieve both the statutory objective and to preserve the freedom of broadcasters, that alternative is to be preferred under the First Amendment.⁸

Respondents also argue (Br. 84-86) that there is no empirical evidence showing that the court of appeals' format doctrine has a chilling effect on broadcasters' exercise of First Amendment rights. But the record belies this claim.⁹ The Commission was entitled to draw reasonable inferences from this evidence, other comments, and its own knowledge of the broadcast industry, and to give recognition to the principle that "[i]t is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). The Commission's analysis of the chilling effect of format regulation was thorough and reasoned, and should have been sustained by the court of appeals. See our initial brief at 55-56.

⁸The Commission has pursued diversity in entertainment programming by making new frequencies available to minority-controlled broadcasters. See our initial brief 57-58 n. 42. See also *Clear Channel Broadcasting in the AM Broadcast Band*, F.C.C. No. 80-317 (June 20, 1980), 45 Fed. Reg. 43172, 43181-43182 (1980). Although respondents argue that these structural reforms are unrelated to the goal of programming diversity, this Court has accepted the Commission's long-standing view that structural diversity promotes programming diversity. See, e.g., *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978).

⁹One broadcaster stated that he "would never have started this [unique] all news [format] if there was any possibility of being locked into [it] . . ." (C.A. App. 426). And an expert witness who presented an extensive statement to the Commission expressed his opinion that government format regulation would curtail experimentation and discourage innovation in programming (App. 74).

3. Respondents argue (Br. 42-53) that the Commission's consideration of a staff analysis paper, prior to public comment thereon, violated the Administrative Procedure Act and the Due Process Clause, and that this action is a separate basis for affirming the decision of the court of appeals. That contention is without merit. The court of appeals specifically disclaimed reliance on this alleged procedural error as a basis for reversing the Commission (Pet. App. 17a n.24). And it did so for good reason, since the Commission's review of the staff analysis paper does not constitute reversible error.

a. Respondents have wholly failed to demonstrate why, in an informal policy-making proceeding such as this, adversarial testing of a staff paper discussing publicly available data is essential.¹⁰ Section 553(b)(3) of the APA,

¹⁰Rather than being a long-withheld study, as respondents suggest, the work reflected in the staff analysis paper was commenced and completed "shortly before" its public release. See Pet. App. 183a n.3. The paper, which was attached as an appendix to the Commission's July 30, 1976 Policy Statement, and which was subject to rebuttal prior to the Commission's August 25, 1977 order denying reconsideration, contained: 1) an evaluation of certain economic arguments and a straightforward statistical study of publicly available format and audience rating information; 2) a table listing radio stations and formats in the top 25 markets, taken from a commonly available industry reference book; 3) a table listing subcategories of 18 different formats, taken directly from the same public reference book and 4) a table displaying the results of a statistical analysis of the relationship between audience ratings and radio format types in the same 25 markets, also based on readily available public data. See Pet. App. 156a-170a. A memorandum further explaining the paper (C.A. App. 71-73), along with the computer printouts relating to the staff's data (*id.* at 76-87), was released shortly after being produced as an accommodation to a Freedom of Information Act requester (*id.* at 68-69). This material was also placed in the public docket in the present proceeding. As a further accommodation to the Freedom of Information Act requester, an explanation of the numbers in the computer printout was prepared and released in March 1977. This

5 U.S.C. 553(b)(3), which governs informal proceedings such as these, requires only that prior "general" notice be given of the "terms or substance of the proposed rule or a description of the subjects and issues involved." Disclosure of the proposed rule or the issues to be considered facilitates meaningful public comment, but there is no requirement of advance disclosure of each piece of information that the agency may consider.¹¹ And as this Court's decisions clearly establish, additional procedural requirements should not be engrafted on the Administrative Procedure Act by the judiciary. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524, 543 (1978); see also *Costle v. Pacific Legal Foundation*, No. 78-1472 (Mar. 18, 1980), slip op. 16. Whether additional procedural safeguards, beyond those prescribed by Congress, should be adopted in particular rule-making contexts is a question addressed to the administrative agency's discretion. *Ibid.*

explanation was likewise placed in the public docket. C.A. App. 573-575. Respondents claim that they did not see this last item until after the Commission's August 1977 reconsideration order.

¹¹See *B.F. Goodrich Co. v. Department of Transportation*, 541 F. 2d 1178, 1184 (6th Cir. 1976), cert. denied, 430 U.S. 930 (1977). "Informal" rule-making proceedings would be encumbered with extraordinary procedural complexity if administrative agencies were required to give separate notice and solicit public comment whenever their staff members prepared a paper discussing publicly available information. A petition for reconsideration is the statutory vehicle for obtaining public criticism of the staff's analysis. See *Hercules, Inc. v. EPA*, 598 F. 2d 91, 129 (D.C. Cir. 1978). Moreover, the Administrative Procedure Act itself contemplates that administrative agencies may maintain the confidentiality of pre-decisional communications between the staff and the agency. See 5 U.S.C. 552(b)(5); *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150-154 (1975); *EPA v. Mink*, 410 U.S. 73, 85-90 (1973).

These considerations are particularly compelling in this case, since the Commission's staff did not create new data or conduct scientific tests, the results of which were unavailable to the public. All of the information considered by the staff was publicly available and was open to comment and analysis by any party, and was directly related to the issues on which the Commission had expressly solicited public comment.¹²

b. Still more fundamentally, respondents have failed to demonstrate that the staff analysis paper was material to the Commission's decision, or that their belated commentary on the staff's paper is significant. The staff's paper was clearly not an indispensable element in the Commission's determination. The study merely "len[t] further credence" (Pet. App. 129a) to the Commission's experience-based conclusion that the court of appeals' "format doctrine" is infeasible to administer and counter-productive. There is no suggestion that, absent the staff analysis paper, the Commission would have reached a different result. Moreover, the staff analysis paper was

¹²This case has no similarity to the cases on which respondents rely (Br. 42, 50-51), in which scientific tests or expert studies produced new information that interested parties had no means to anticipate or analyze. See, e.g., *United States v. Nova Scotia Food Products Corp.*, 568 F. 2d 240, 249-252 (2d Cir. 1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F. 2d 375, 392-395 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). Cases such as *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F. 2d 831, 837, 842 (5th Cir. 1978), and *Mobil Oil Corp. v. FPC*, 483 F. 2d 1238 (D.C. Cir. 1973), which concern proceedings subject to the "substantial evidence" standard, have no application in this informal rule-making context. See generally *Action for Children's Television v. FCC*, 564 F. 2d 458, 477-478 (D.C. Cir. 1977). We also note that many of the lower court decisions relied on by respondents antedate this Court's decision in *Vermont Yankee*. To the extent that they impose additional procedural requirements in rule-making proceedings, their authority has not survived *Vermont Yankee*.

cumulative of other data and expert commentary submitted by interested parties in this proceeding. See, e.g., App. 23-92. That data and commentary were subject to adversarial testing. Finally, neither respondents nor any other parties have ever advanced any substantial objections to the correctness of the staff's analysis that would require the Commission to exclude the study from consideration.¹³

In sum, even viewing respondents' arguments about the staff analysis paper in the light most favorable to them, they fail to show any basis for vacating the Commission's policy interpretation. That interpretation rests firmly on the Commission's construction of its own organic statute, on its actual experience in attempting to administer the "format doctrine," and on its predictive judgment. This Court has recognized that administrative agencies may adopt policies based on predictions and accumulated experience. "[C]omplete factual support in the record for the Commission's judgment or prediction is not possible

¹³Respondents belatedly off^{er} (Br. 49 n.111) several minor criticisms of the staff analysis paper. Those criticisms could have been presented to the Commission and are not properly raised for the first time in this Court. See 47 U.S.C. 405. In any event, respondents' contentions are without substance. The "equation" that respondents complain was withheld was an elementary application of regression analysis and Table 3 of the staff paper is capable of easy comprehension by any person with even minimal training in statistics. Contrary to respondents' suggestion, the data concerning the top 25 markets were not used to prove the extent of diversity in smaller markets, but rather were used to show the subjectivity of format categorization. The data also illustrate the proposition that disparity in listener interest in different stations of the same general format type would make "format regulation" a fruitless undertaking. Moreover, there is no reason to conclude that the general inferences drawn from this data would be inapplicable to smaller markets. Finally, respondents plainly err in claiming that the staff study included only "147 stations." The study considered 837 stations. See Pet. App. 168a; C.A. App. 74.

or required." *FCC v. National Citizens Committee for Broadcasting*, *supra*, 436 U.S. at 814.

For the foregoing reasons and those stated in our initial brief, the judgment of the court of appeals should be reversed.

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OCTOBER 1980

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL COMMUNICATIONS COMMISSION
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On Writ of Certiorari To The
United States Court of Appeals For
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REPLY BRIEF FOR INSILCO BROADCASTING
CORPORATION, INSILCO BROADCASTING CORPORATION
OF LOUISIANA, INC., INSILCO RADIO OF OKLAHOMA,
INSILCO BROADCASTING CORPORATION OF
OKLAHOMA, INC., McCLATCHY NEWSPAPERS,
NEWHOUSE BROADCASTING CORPORATION, PALMER
BROADCASTING COMPANY, PLOUGH BROADCASTING
COMPANY, INC.

I. RESPONDENTS' ATTEMPTED EXTENSION OF *RED LION* TO COVER FORMAT REGULATION COUNTERVAILS THE FIRST AMENDMENT'S MAJOR PURPOSE

The First Amendment assumes that government is incapable of divining what speech is good for the citizenry and what is not. History shows that government is insufficiently wise for this task, and that government will abuse to its own ends any power of content selection.¹

Respondents assert that *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), compels regulation of radio formats because of the public's paramount rights in broadcasting media.² Respondents, however, avoid our arguments³ that broadcasting's unique problem of allocating scarce frequencies need not, and does not under this Court's decisions, compel an entirely separate constitutional realm from other media of expression. A governmental role in selecting broadcast licensees necessitates limiting the reach of traditional First Amendment doctrine only to a small extent.

Accommodating the need for a licensing scheme under the First Amendment has been addressed by this Court recently in *Red Lion, Columbia Broadcasting System, Inc. v. Democratic National Committee*,⁴ *FCC v. National Citizens Committee for Broadcasting*⁵ and *FCC v. Midwest Video Corp.*⁶ These cases explain the central role of licensees' editorial discretion and the quite limited power of government to impinge upon content selection. These decisions are fundamentally incompatible with

¹ *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting).

² Respondents' Brief at 73 *et seq.*

³ Insilco Brief at 29-41.

⁴ 412 U.S. 94 (1973).

⁵ 436 U.S. 775 (1978).

⁶ 440 U.S. 689 (1979).

Respondents' urging that a federal agency is the proper entity to mandate basic editorial decisions about radio formats.

Respondents understandably rely on descriptive passages from *Red Lion* in isolation from its subject: the fairness doctrine and personal attack rules. Yet Mr. Justice White's opinion in *Red Lion* specifically disavowed such expansive application,⁷ and indicated that approval of the fairness doctrine rested in large measure on preserving broadcasters' discretion.⁸

Respondents attack our view that "less drastic means" analysis should be applied in this case.⁹ They argue that we have sought to overturn *Red Lion* and to analyze broadcasting by ignoring the "physical realities" of spectrum allocation.¹⁰ Respondents misconstrue the point.

In our first brief we noted that principled resolution of the format issue to some extent requires reconciling *Red Lion*'s holding with a wider body of First Amendment doctrine. We did not, however, dispute *Red Lion*'s finding of scarce frequencies or of the need for their allocation by government.¹¹

Rather, we emphasized that the uniqueness of broadcasting is not just the scarcity of frequencies—all media resources are scarce in ultimate terms—but that the nature of electromagnetic channels requires allocation by official authority instead of by economic forces or some other nongovernmental mechanism. This undisputed fact implicates decisions of this

⁷ 395 U.S. at 396.

⁸ *Id.*

⁹ Respondents' Brief at 76-82.

¹⁰ *Id.* at 77 n.190.

¹¹ Respondents' assertion that we seek to challenge *Red Lion*'s rationale is therefore inaccurate. Rather, our aim has been to point out that *Red Lion* did not necessarily change the First Amendment's traditional aim of limiting governmental control over media of expression.

Court, beginning with *Hague v. CIO*, 307 U.S. 496 (1939), that limit the methods permitted government in regulating access to public forums.¹² The controlling principle is that because of the constant possibility of abuse of discretion,¹³ "government . . . cannot draw distinctions between permitted and prohibited speech on the basis of speech content."¹⁴

In broadcasting, government abuse of the licensing process is most likely to take the form of attempts to influence news and public affairs, especially the coverage of controversial issues of public importance.¹⁵ An administration, acting through the Commissioners it appoints, might try to install licensees who were sympathetic to official suggestions about editorial policy, or to influence existing stations by threatening to deny renewal. Under the fairness doctrine, however, these efforts would mean little, for rough balance in stations' coverage of controversial issues must result in any event.

This rationale was not discussed at the time of the fairness doctrine's creation.¹⁶ It nevertheless provides an independent

¹² Insilco Brief at 37. See generally Cass, *First Amendment Access to Government Facilities*, 65 Va. L. Rev. 1287, 1288-95 (1979). Respondents cannot be taken seriously when they assert (Respondents' Brief at 78 n.193) that there is a paucity of scholarly support for the need to harmonize First Amendment theory in this area. See, e.g., L. Tribe, *American Constitutional Law* 699 (1978).

¹³ See, e.g., *Kunz v. New York*, 340 U.S. 290 (1951).

¹⁴ Cass, *supra* n.12, at 1299.

¹⁵ See generally National Association of Educational Broadcasters, *The Nixon Administration Public Broadcasting Papers: A Summary, 1969-1974* (1979). Certainly, in future, Congress might find that risks of abuse in licensing were no longer a sufficient reason for maintaining the fairness doctrine.

¹⁶ The fairness doctrine took form in *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246 (1949). The Commission's cursory constitutional analysis concentrated on protecting the "paramount interests of the people" by preserving "the right of the American people to listen . . . free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees."

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constitutional justification for the fairness doctrine, centering on the First Amendment's primary function of limiting governmental power over the marketplace of ideas. It is closely related as well to *Red Lion's* concern that licensees, acting by virtue of their governmentally-conferred status, might become the vicarious means of censorship.¹⁷

This constitutional analysis does not, however, justify government involvement in program areas beyond the scope of *Red Lion*, as Respondents have argued. The theory instead prevents government from converting the need to allocate spectrum space into the opportunity to promote certain content and to discourage the broadcast of views it deems contrary to its own (or the public's) well-being. This is precisely the danger anticipated in *Red Lion* and forestalled in *CBS v. DNC*.

II. THE FUTILITY OF GOVERNMENT EVALUATION OF PROGRAM CONTENT IS DEMONSTRABLE IN FCC DECISIONS

Respondents and Amici assert that the Commission has, over the years, successfully decided license contests by assessing which broadcast applicant would present superior programs. In

(footnote continued from prior page)

Id. at 1257 (emphasis added). The difficulty with this justification is its self-contradiction. Under the Communications Act's licensing scheme, program selection is reposed in licensees. But if neither government nor licensees can perform the function, the result is paralysis or chaos. This Court's decision in *CBS v. DNC* resolved any ambiguity about licensees' rights to exercise the editorial prerogative. 412 U.S. at 130-31.

¹⁷ See 395 U.S. at 392. We speak here of censorship as a governmental function, distinguished from the private (non-governmental) task of editing. See *CBS v. DNC*, 412 U.S. at 124-25.

our first brief we demonstrated that, to the contrary, the Commission's hearing process is not even remotely suited to evaluating the relative worth of program proposals.¹⁸

Respondents point to the Commission's *Blue Book*¹⁹ as an example of successful content regulation.²⁰ In fact, the *Blue Book* proposed gross intrusions into licensee decisionmaking and was therefore consigned to innocuous desuetude shortly after its adoption.²¹ It is a monument to the intractable problem created whenever the Commission attempts to evaluate the relative worth of programming.

Amici argue that Commission hearing decisions routinely incorporate program issues.²² They fail to mention that no such case has ever been decided solely on programming, and that the cases which attempt to evaluate programming have been

¹⁸ Insilco Brief at 25 n.73.

¹⁹ Federal Communications Commission, *Public Service Responsibility of Broadcast Licensees* (1946) (the "*Blue Book*").

²⁰ Respondents' Brief at 69.

²¹ One commentator described the *Blue Book*'s fate as follows:

The 'Blue Book' became the common name of the document because of the color of its cover and because of the tendency of the policy statement's opponents to associate it with the 'blue pencil' of censorship and/or 'blue-blooded' authoritarianism (since official documents of the British government were also called 'blue-books'). . . .

The 'Blue Book' was interred a few years later. . . .

Neither vigorously enforced nor officially repudiated by the FCC, the very potency of the 'Blue Book' rendered it ineffectual. Its theme of balanced programming as a necessary component of broadcast service in the public interest coupled with its emphasis on a reasonable ratio of unsponsored ('sustaining') programs posed too serious a threat to the profitability of commercial radio for either the industry, Congress, or the FCC to want to match regulatory promise with performance.

F. Kahn, *Documents of American Broadcasting* 132-33 (3d ed. 1978).

²² Brief of Amici American Symphony Orchestra, *et al.* at 16-17.

wholly unsatisfactory. For example, *WPIX, Inc.*,²³ cited by Amici,²⁴ was a four-to-three decision in which the Commission was bitterly²⁵ divided on the programming question. The majority gave the incumbent a major preference for its program record,²⁶ while the minority awarded "a substantial demerit, a minus of major significance."²⁷ *WPIX* demonstrates only that Commissioners' program analyses are highly subjective and, therefore, basically standardless.²⁸

Amici also offer *Cosmopolitan Broadcasting Corp.*²⁹ as an example of how the Commission can resolve programming issues.³⁰ However, *Cosmopolitan* was decided on remand from the Court of Appeals for the District of Columbia Circuit,³¹ which ordered³² the Commission to consider programming issues according to the very precedent—*Citizens Committee to*

²³ *WPIX, Inc.*, 68 F.C.C.2d 381 (1978), appeal pending sub nom. *Forum Communications, Inc. v. FCC*, No. 78-1574 (D.C. Cir.).

²⁴ Brief of Amici American Symphony Orchestra, *et al.* at 17.

²⁵ A member of the majority, Commissioner Quello, wrote a separate opinion describing the minority opinion as "so sharply critical . . . that it amounts to a diatribe . . ." 68 F.C.C.2d at 457. He also lamented the minority's "shrill protests," *id.* at 458.

²⁶ *Id.* at 400.

²⁷ *Id.* at 455.

²⁸ A number of Commissioners in *WPIX* reflected on the lack of adequate standards for comparative renewals. See, e.g., the separate statement of Chairman Ferris, *id.* at 455-56. A recent analysis demonstrates the virtual impossibility of deriving adequate standards for assessing the public interest value of radio formats. Spitzer, *Radio Formats by Administrative Choice*, 47 U. Chi. L. Rev. 647 (1980). Professor Spitzer concludes that "unless one can convincingly argue for paternalistic choice of formats, unfettered licensee choice probably is preferable to *WEFM*." *Id.* at 685.

²⁹ 75 F.C.C.2d 423 (1980).

³⁰ Brief of Amici American Symphony Orchestra, *et al.* at 17.

³¹ *Cosmopolitan Broadcasting Corp. v. FCC*, 581 F.2d 917 (D.C. Cir. 1978).

³² *Id.* at 931.

*Preserve the Voice of Arts in Atlanta v. FCC*³³ and *Citizens Committee to Save WEFM v. FCC*³⁴—now at issue before this Court. Thus *Cosmopolitan* hardly demonstrates the Commission's propensity, independent of compulsion by the court of appeals, to decide license disputes in the manner suggested by the format cases.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our initial brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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October 23, 1980

³³ 436 F.2d 263 (D.C. Cir. 1970).

³⁴ 506 F.2d 246 (D.C. Cir. 1974) (*en banc*).